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Laws of Wisconsin.

[BY AUTHORITY.]

☞ [*Every Statute which does not expressly prescribe the time when it shall go into operation, shall take effect throughout the State on the twentieth day, next after that on which it shall be approved by the Governor, or otherwise become a Law, according to the provisions of the Constitution: Provided, that no General Law shall be in force until published.*]—CHAP. 4, SEC. 4, PAGE 60, REV. STAT.

Published March 11.

An Act to amend Chapter 120 of Session Laws of 1856.

The People of the State of Wisconsin, Represented in Senate and Assembly, do enact as follows:

SEC. 1. Chap. 120 of the Session Laws of 1856, entitled "An Act to simplify and abridge the practice, pleadings and proceedings of the Courts of this State" is amended as follows.—Where the word "parties" occurs in Section 29 of said Act, the word "defendants" shall be inserted instead thereof; Provided such action as is set forth in Section 29, may be tried in the County where the defendant may be at the time he is served with a summons, and provided further, that nothing in said Chapter 120 shall be construed to change the County where an action against a corporation might have been tried before the passage of said act; except that in an action against an Insurance Company, the same may be tried in the County where the cause of action, or part thereof, arose.

SEC. 2. Where the said Chapter 120 does not prescribe on what party, agent, officer, a summons may be served, such summons may be served on the party, agent or officer designated by law, before said act took effect.

SEC. 3. After subdivison 2 of Section 215 of said Chapter 120, the word "except where a Justice of the Peace has jurisdiction" shall be inserted. In Section 95 where the figures "57" occur, figures "87" shall be inserted instead thereof. In Section 243, where the words "Section 158" occur, the words "Section 148 and 149" shall be inserted instead thereof. In Section 290, before the figures "90," the figures "85" shall be read and inserted. In Section 305 the word "received" shall be read "reviewed." In Section 369 the figures "152" shall be read "153." In Section 354 the words "10th day of December 1856" shall be read the "1st day of March 1857." The words "Register of Deeds" shall be read in Section 37 of said Chapter, instead of the words "Clerk of the Circuit Court," and Section 19 of said Chapter is hereby repealed.

SEC. 4. Where a judgment shall be entered by the Clerk according to the first subdivision of Section 158 of said Chapter 120, no execution shall be issued until after the expiration of a special or general term of the Court which would be authorized for cause shown, to set aside said judgment.

SEC. 5. The costs allowed to the prevailing party in a Justice Court are not altered by said Chapter 120; Provided that the allowances made to the recovering party in a Court of Record, by the first, second, third, fourth and fifth subdivisions of Section 218 of said Chapter 120, shall never in one action, exceed the sum of sixteen dollars.

SEC. 6. Nothing contained in said Chapter 120 shall be construed to confer or create any rights of redemption of property sold on the foreclosure of a mortgage not provided for by law prior to the passage of said Act.

WYMAN SPOONER,
Speaker of the Assembly.

C. LATHAM SHOLES,
President of the Senate *Pro Tem.*

Approved March 7, 1857.

COLES BASHFORD.

STATE OF WISCONSIN, } ss.
SECRETARY'S OFFICE. }

The Secretary of State, of the State of Wisconsin, does hereby certify, that the foregoing act has been compared with the original enrolled act deposited in this office, and that the same is a correct and true copy thereof, and of the whole of such original.

In witness whereof the said Secretary of State has hereunto set his hand and affixed the Great Seal of the State, at the Capitol in Madison the 11th day of March, A. D. 1857.

L.S.

JOHN W. HUNT,
Asst. Secretary of State.

THE

CODE OF PROCEDURE

OF THE

State of Wisconsin,

PASSED BY THE LEGISLATURE;

APPROVED

OCTOBER 11, 1856.

ARRANGED AND PRINTED UNDER THE SUPERINTENDENCE OF

J. C. HOPKINS, ESQ.,

BY THE GOVERNOR DULY APPOINTED FOR THAT PURPOSE.

MADISON:

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GENERAL LAWS OF WISCONSIN, 1856.

Chapter 120.

AN ACT

TO SIMPLIFY AND ABRIDGE THE PRACTICE, PLEADINGS AND PROCEEDINGS OF THE COURTS OF THIS STATE.

WHEREAS, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished; that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established: *Therefore,*

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

General Definitions and Divisions.

SECTION 1. Division of remedies.
2. Definition of an action.
3. Definition of a special proceeding.
4. Division of actions.
5. Definition of Criminal actions.
6. Definition of a civil action.
7. Civil and criminal remedies not merged.
8. To what actions this act relates.

SECTION 1. Remedies in the courts of justice are divided into: Division of remedies.

1. Actions:
2. Special proceedings.

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Definition of an action.

SEC. 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the prevention of a public offence.

Definition of a special proceeding.

SEC. 3. Every other remedy is a special proceeding.

Division of actions.

SEC. 4. Actions are of two kinds.

1. Civil:
2. Criminal:

Definition of criminal actions.

SEC. 5. A criminal action is prosecuted by the people of the state, as a party against a person charged with a public offence, for the punishment thereof.

Definition of a civil action.

SEC. 6. Every other is a civil action.

Civil and criminal remedies not merged.

SEC. 7. Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

To what actions this act relates.

SEC. 8. This act relates to civil actions in the courts of this state commenced after the tenth day of December eighteen hundred and fifty six, except where otherwise provided herein.

TITLE 1.

Of Justice Courts.

SECTION 9. Jurisdiction of Justice not changed.
10. Rules of pleadings.
1. Pleadings.
2. Pleadings, how put in.
3. Complaint.
4. Answer.
5. Pleadings, what to contain.
6. Demurrer.
7. Proceedings in demurrer.
8. Plaintiff to prove his case if defendant do not appear.
9. Proceedings in action on account of instrument for the payment of money only.
10. Variance when disregarded.
11. Amending pleadings.
12. Execution when issuable and returnable.
13. Execution on Justice's judgment docketed.
14. Requiring party to exhibit his account.
15. Certain provisions made applicable to these courts.

SEC. 9. The courts of justice of the peace shall continue to exercise the jurisdiction now vested in them respectively, and the proceedings in such courts shall be as now prescribed by law, except as otherwise provided by this act. Jurisdiction of justices' courts.

SEC. 10. The following rules of pleading and proceeding shall be observed in the courts of justice of the peace: Rules of pleading.

1.

The pleadings in these cases are; Pleadings.
1. The complaint of the plaintiff;
2. The answer by the defendant.

2.

The pleadings may be oral or in writing; if oral, the substance shall be entered by the justice of this docket; if in writing, they shall be filed by him, and a reference to them be made in the docket. Pleadings how put in.

3.

The complaint shall state in a plain and direct manner, the facts constituting the cause of action. Complaints.

4.

The answer may contain a denial of the complaint, or of any part thereof, and also notice in a plain and direct manner of any facts constituting a defence. Answer.

5.

Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. Pleadings what to contain.

6.

Either party may demur to a pleading of his adversary, or any part thereof, where it is not sufficiently explicit to enable him to understand it, or it contain no cause of action or defense, although it be taken as true. Demurrers.

7.

If the court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend the defective pleading shall be disregarded. Proceedings on demurrer

8.

Plaintiff to prove his case if defendant do not appear.

In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case, except in cases provided by law.

9.

Proceedings in action on account of instrument for the payment of money only

In an action or defence founded upon an account or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court and to state that there is due to him from the adverse party a specified sum which he claims to recover or set off.

10.

Variance when disregarded.

A variance between the proof on the trial and the allegation in a pleading shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.

11.

Amending pleadings.

The pleadings may be amended at any time before the trial or during the trial or upon appeal, when, by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court by oath that an adjournment is necessary to the adverse party, in consequence of such amendment an adjournment shall be granted. The court may, also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court; but no amendment shall be allowed after a witness is sworn on a trial, when an adjournment thereby will be made necessary.

12.

Execution when issuable and returnable

Execution may be issued on a judgment heretofore or hereafter rendered in a justice court, at any time within two years after the rendition thereof, and shall be returnable thirty days from the date of the same.

13.

Execution on justices judgment

If the judgment be docketed with the clerk of the circuit court, the execution shall be issued by him to the sheriff of the county and have the same effect, and be ex-

ecuted in the same manner as other executions and judgments of the circuit court.

14.

Requiring party to exhibit his account.

The court may at the joining of issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account or demand, or state the nature thereof so far forth as may be in his power, and in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated.

15.

Certain provisions made applicable to these courts.

The provisions of this act respecting forms of actions, parties to actions, and the examination of parties and witnesses shall apply to courts of justices of the peace.

TITLE 2.

Of the forms of Civil Actions,

SECTION 11. Distinction between actions at law, and suits in equity and form of all such actions and suits abolished.
12. Parties to an action, how designated.
13. Actions on judgment, when and how brought.
14. Feigned issues abolished and order for trial substituted.

Distinction between actions at law and suits in equity and form of all such actions and suits abolished.

SEC. 11. The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

Parties to an action how designated.

SEC. 12. In such action, the party complaining, shall be known as the plaintiff, and the adverse party as the defendant.

Actions on judgment when and how brought.

SEC. 13. No action shall be brought upon a judgment rendered in any court of this state, except a court of the justices of the peace, between the same parties, without leave of the court, for good cause shown on notice to the adverse party; and no action on a judgment rendered by a justice of the peace shall be brought in the same county

within two years after its rendition, except in cases of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

Feigned issues abolished and order for trial substituted.

SEC. 14. Feigned issues are abolished, and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury. An order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such shall be the only authority necessary for a new trial.

TITLE 3.

Of the parties to Civil Actions.

SECTION 15. Action to be in the name of the real party in interest.
16. Assignment of a thing in action not to prejudice a defence.
17. Executor or Trustee may sue without the persons beneficially interested.
18. When a married woman is party, the husband to be joined, except, &c.
19. When husband cannot be joined, must sue by next friend.
20. Infant to appear by guardian.
21. Who may be joined as plaintiffs.
22. Who may be joined as defendants.
23. Parties united in interest, when to be joined and when one or more may sue and defend for the whole.
24. Plaintiff may sue in one action, all the parties to commercial paper.
25. Actions when not to abate by death, marriage or other disability, and proceedings in such case.
26. Court when to decide controversy, or to order other parties to be brought in. Proceeding instead of bill of interpleader.

Action to be in the name of the real party in interest.

SEC. 15. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section seventeen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract.

Assignment of a thing in action not to prejudice a defence.

SEC. 16. In case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any set off or other defence existing at the time of or before notice of the assignment, but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith, and upon good consideration before due.

Executor or trustee may sue without the persons beneficially interested.

SEC. 17. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted; a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

When a married woman is party the husband to be joined.

SEC. 18. When a married woman is a party, her husband must be joined with her, except that:

1. When the action concerns her seperate property, she may sue alone.

Except.

2. When the action is between herself and husband, she may sue, or be sued alone.

When he cannot, must sue by next friend.

SEC. 19. But where the husband cannot be joined with her, as herein provided, she shall prosecute and defend by her next friend.

Infant to appear by guardian.

SEC. 20. When an infant is a party, he must appear by his next friend or guardian as now provided by law.

Who may be joined as plaintiffs.

SEC. 21. All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

Who may be joined as defendants.

SEC. 22. Any person may be made a defendant who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

Parties united in interest when to be joined and when one or more may sue and defend for the whole.

SEC. 23. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who shall have been joined as plaintiffs, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint, and when the question is one of a common or general interest of many persons, or when the parties are

very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Plaintiff may sue in one action all the parties to commercial paper.

SEC. 24. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff.

Actions when not to abate by death, marriage, or other disability and procedure in such case.

SEC. 25. No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage or other disability of a party, the court, on motion at any time within one year thereafter or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action.

Court when to decide controversy or to order other parties to be brought in.

SEC. 26. The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights, but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in; and when in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant, against whom an action is pending, upon a cantract, or for specific, real, or personal property, may at any time before, answer upon affidavit, that a person, not a party to the action, and without collusion with him makes against him a demand for the same debt or property, upon due notice to such person, and the adverse party apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make the order.

Proceeding instead of bill of interpleader.

TITLE 4.

Of the place of trial of Civil Actions.

SECTION 27. Certain actions to be tried where the subject is situated.
28. Other actions where the cause arose.
29. Other actions according to the residence of the parties unless changed on demand of defendant.
30. In what cases place of trial may be changed.
31. Where place of trial is changed; papers to be transferred also.

Certain actions to be tried where the subject is situated

SEC. 27. Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by statute:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. For the protection of real property.
3. For the foreclosure of a mortgage of real property.
4. For the recovery of personal property distrained for any cause.

Other actions where the cause arose.

SEC. 28. Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like powers of the court to change the place of trial in the cases provided by statute:

1. For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream where the offence was committed.
2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, shall do any thing touching the duties of such officer.

Other actions according to the residence

SEC. 29. In all other cases, the action shall be tried in the county in which the parties, or any of them, shall re-

of the parties unless changed on demand of defendant.

side at the commencement of the action; or if none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial in the cases provided by the statute. If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand, in writing, that the trial be laid in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court as provided in this section.

In what cases place of trial may be changed.

SEC. 30. The court may change the place of trial in the following cases:

1. Where the county designated for that purpose in the complaint, is not the proper county.

2. Where there is reason to believe that an impartial trial cannot be had therein.

3. When the convenience of witnesses, and the ends of justice would be promoted by the change.

Where the place of trial is changed papers to be transferred also.

SEC. 31. When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or order of the court, and the papers shall be filed or transferred accordingly.

TITLE 5.

Of the manner of commencing Civil Actions.

SECTION 32. Actions—how commenced.
33. Summons, requisite of.
34. Notice to be inserted in certain actions.
35. Complaint need not be served with summons; in such case, summons must state where it is, or it will be filed; when it must be served; when notice of object of suit may be served with summons.
36. Defendant unreasonably defending when to pay costs.
37. Notice of pendency of action affecting title to real property.
38. Summons—by whom served.
39. Summons—how served and returned.
40. Publication when defendant cannot be found. Affidavit what to contain, in what cases publication may be made, what the order shall contain, personal service of summons and complaint equivalent to publication, when defendant may be allowed to defend, bonds for restitution in all such cases complaint to be first filed.
41. Proceedings when there are several defendants and part only are served.
42. When service complete in case of publication.
43. Service of summons, how proved.
44. When jurisdiction of an action acquired.

Actions, how commenced.

SEC. 32. Civil actions in the courts of records of this state shall be commenced by the service of a summons with or without seal.

Summons, requisite of.

SEC. 33. The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons at a place within the state to be therein specified, in which there is a post office, within twenty days after the service of the summons, exclusive of the day of service.

Notice to be inserted in certain actions

SEC. 34. The plaintiff shall also insert in the summons a notice in substance as follows:

1. In an action arising on contract for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint in twenty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint within twenty days after service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

Complaint need not be served with summons, in such case summons must state where it is, or it will be filed.

SEC. 35. A copy of the complaint need not be served with the summons. In such case the summons shall state where the complaint is, or will be filed. And if the defendant, within twenty days thereafter, in person or by attorney, demand, in writing, a copy of the complaint, specifying a place within the state where it may be served; a copy of it shall be served within twenty days thereafter accordingly; and after such service, the defendant shall have twenty days to answer; but only one copy need be served on the same attorney. In the case of a defendant against whom no personal claim is made in an action, the plaintiff may deliver to such defendant, with a summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action. A brief description of the property affected by it, if it affect specific, real, or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the term for answering, he shall, in writing, demand the same.

When must be served.

When notice of object of suit may be served with summons.

Defendant unreasonably defending when to pay costs.

SEC. 36. If a defendant on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

Notice of pendency of action affecting title to real property.

SEC. 37. In an action affecting the title to real property, the plaintiff at the time of filing the complaint, or at any time afterwards, may file with the clerk of the circuit court of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby, and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only, shall the pendency of the

action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

Summons, by whom served.

Sec. 38. The summons may be served by the sheriff of any county where the defendant may be found, or by any other person not a party to the action.

The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence.

The person subscribing the summons may, at his option, by an endorsement on the summons, fix a time for the service thereof, and the service then shall be made accordingly.

Summons how served and returned.

Sec. 39. The summons shall be served by delivering a copy thereof as follows:

1. If the suit be against a corporation to the president or other head of the corporation, secretary, cashier, treasurer, director, or managing agent thereof, but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein.

2. If against a minor, under the age of fourteen years, to such minor personally, and also to his father, mother or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed, to such committee, and to the defendant personally.

4. In all other cases to the defendant personally, or if not found, by leaving a copy thereof at his usual place of abode, in presence of some one of the family of suitable age and discretion who shall be informed of the contents thereof.

Affidavit—what to contain.

Sec. 40. When the person on whom the service of the summons is to be made cannot after due diligence be found within the state, and that fact shall appear by affidavit to the satisfaction of a court or a judge thereof, or a county judge or court commissioner, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to an action relating to real property in this state, such court or judge

may grant an order that the service be made by the publication of a summons in either of the following cases:

In what cases publication may be made.

1. Where the defendant is a foreign corporation and has property within this state or the cause of action arose therein.

2. When the defendant being a resident of this state has departed therefrom with intent to defraud his creditors or avoid the service of a summons, or keeps himself concealed therein with the like intent.

3. Where he is a non-resident but has property therein, and the action is on contract, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein.

5. Where the action is for divorce in the cases prescribed by law:

What the order shall contain.

The order shall direct the publication to be made in one newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as shall be deemed reasonable, not less than once a week for six weeks.

Personal service of summons and complaint equivalent to publication.

In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence, unless it appears that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him.

When defendant may be allowed to defend.

When the publication is ordered, personal service of a copy of the summons and complaint out of the state shall be equivalent to publication and deposit in the post office.

If the summons shall not be personally served on a defendant, nor received by such defendant, through the post office, in the cases provided for in this section, he, or his representatives shall, on application and sufficient cause shown, at any time before judgment be allowed to defend the action; and except in actions for divorce, the defendant or his representatives may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within three years after its rendition, on such terms as shall be just, except in actions for divorce; and if the defence

be successful, and the judgment or any part thereof, shall have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court shall direct; and the court may require bonds to be given for such restitution before execution is issued, as is now required by law, but the title to property sold under such judgment, to a purchaser in good faith, shall not thereby be affected; and in all cases where publication is made, the complaint shall be first filed, and the summons as published shall state the time and place of such filing.

Bonds for restitution in all such cases complaint to be first filed.

Proceedings where there are several defendants, and part only are served.

SEC. 41. When the action is against two or more defendants, and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:

1. If the action be against several persons jointly indebted upon a contract, he may proceed against the defendant served, unless the court shall otherwise direct; or,

2. In an action against defendants severally liable, he may proceed against the defendant or defendants served in the same manner as if such defendant or defendants were the only parties proceeded against.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone.

When service complete in case of publication.

SEC. 42. In the cases mentioned in section forty, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

Service of summons—how proved.

SEC. 43. Proof of the service of the summons and of the complaint, or notice, if any, accompanying the same, shall be as follows:

1. If served by the sheriff, his certificate thereof; or,

2. If by any other person, his affidavit thereof; or

3. In case of publication, the affidavit of the printer or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post office, as required by law, if the same shall have been deposited; or,

4. The written admission of the defendant. In case of service otherwise than by publication the certificate or affidavit shall state the time and manner of service.

When jurisdiction of action acquired.

SEC. 44. From the time of the service of the summons in a civil action or the allowance of a provisional remedy

the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearace of a defendant is equivalent to a personal service of the summons upon him.

TITLE 6.

Of the pleadings in Civil Actions.

CHAPTER 1. The complaint.
2. The demurrer.
3. The answer.
4. The reply.
5. General rules of pleading.
6. Mistakes in pleading and amendments.

CHAPTER I.

The Complaint.

SECTION 45. Forms of pleading heretofore existing, abolished.
46. First pleading to be complaint.
47. Complaint, what to contain.

Forms of pleading heretofore existing, abolished.

SEC. 45. All the forms of pleading heretofore existing, are abolished, and hereafter the forms of pleading in civil actions, in courts of record, and the rules by which the sufficiency of the pleadings are determined are those prescribed by this act.

First pleading to be complaint.

SEC. 46. The first pleading on the part of the plaintiff is the complaint.

Complaint, what to contain.

SEC. 47. The complaint shall contain,

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled; if the recovery of money be demanded the amount thereof shall be stated.

CHAPTER II.

The Demurrer.

SECTION 48. Defendant to demur or answer.
49. When the defendant may demur and causes of demur.
50. Demurrer must specify grounds of objection to complaint.
51. How to proceed if complaint be amended.
52. Objection not appearing on complaint may be taken by answer.
53. Objection when deemed waived.

Defendant to demur or answer.

SEC. 48. The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

When the defendant may demur, and causes of demur.

SEC. 49. The defendant may demur to the complaint, when it shall appear upon the face thereof; either,

1. That the court has no jurisdiction of the person, of the defendant or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action.

Demurrer must specify grounds of objection to complaint.

SEC. 50. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

How to proceed if complaint be amended.

SEC. 51. If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff upon filing with the clerk, due proof of the service, and of the defendant's omission, may proceed to obtain judgment as provided by section one hundred and fifty eight, but where an application to the court for judgment is necessary, eight days notice thereof must be given to the defendant.

Objection not appearing on complaint, may be taken by answer.

SEC. 52. When any of the matters enumerated in section forty-nine do not appear upon the face of the complaint, the objection may be taken by answer.

Objection, when deemed waived.

SEC. 53. If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER III.

The Answer.

SECTION 54. Answer, what to contain.
55. What constitutes a counter claim.
56. May set forth as many grounds of defence as exists, but must be separately stated.
57. Demurrer as to some causes of action, and answer as to others.
58. Sham defences to be stricken out on motion.
59. Reply, when necessary, and what to contain. What case plaintiff may demur to answer.
60. When defendant may move for judgment upon an answer.
61. Demurrer to reply.

Answer, what to contain.

SEC. 54. The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowldge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition.

What constitutes a counter-claim.

SEC. 55. The counter claim mentioned in the last section, must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action.

May set forth as many grounds of defence as exist, but must be separately stated.

SEC. 56. The defendant may set forth by answer as many defences and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both; they must each be separately stated, and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished.

Demurrer as to some causes of action and answer as to others.

SEC. 57. The defendant may demur to one or more of several causes of action stated in the complaint and answer the residue.

Sham defences to be stricken out on motion.

SEC. 58. Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may, in their discretion, impose.

Reply when necessary, and what to contain.

SEC. 59. When the answer contains new matter, constituting a counter claim, the plaintiff may, within twenty days, reply to such new matter, denying, generally or specially, each allegation controverted by him, or any knowledge or information thereof, sufficient to form a belief, and he may allege, in ordinary and concise language, any new matter not inconsistent with the complaint constituting a defence to such new matter in the answer, and the plaintiff may, in all cases, demur to the answer, for insufficiency, stating, in his demurrer, the grounds thereof, and the plaintiff may demur to one or more of several defences or counter-claims, set up in the answer, and reply to the residue of the counterclaim.

In what cases plaintiff may demur to answer.

When defendant may move for judgment upon an answer.

SEC. 60. If the answer contain a statement of new matter constituting a counter claim, and the pluintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued.

Demurrer to reply.

SEC. 61. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

CHAPTER V.

General Rules of Pleading.

SECTION 62. Pleadings, how subscribed and when verified.
63. Verification of pleadings.
64. How to state an account in pleading.
65. Pleadings to be liberally construed.
66. Irrelevant and redundant matter to be stricken out.
67. Judgments, how to be pleaded.
68. Condition precedent, how to be pleaded.
69. Private statutes, how pleaded.
70. Libel and slander, how stated in complaint.
71. Answer in such cases.
72. In actions to recover property distrained for damage, answer need not set forth title.
73. What causes of action may be joined in same action.
74. To what such causes must belong.
75. Allegation not denied, when to be deemed true.
76. What matters deemed controverted without reply.

Pleadings how subscribed and when verified.

SEC. 62. Every pleading in a court of record must be subscribed by the party, or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Verification of pleadings.

SEC. 63. The verification must be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney; or if all the material allegations of the pleadings be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made

by the party. When a corporation is a party, the verification may be made by any officer thereof. And when the state, or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegations might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading.

How to state an account in pleading.

SEC. 64. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party, within ten days after a demand thereof, in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further account when the one delivered is defective; and the court may in all cases order a bill of particulars of the claim of either party to be furnished.

Pleadings to be liberally construed.

SEC. 65. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties.

Irrelevant and redundant matter to be stricken out.

SEC. 66. If irrelevant and redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite or uncertain, that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

Judgments how to be pleaded.

SEC. 67. In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

Condition precedent how to be pleaded.

SEC. 68. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the

party pleading shall be bound to establish on the trial, the facts showing such performance. In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims.

Private statutes, how pleaded.

SEC. 69. In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof.

Libel and slander—how stated in complaint.

SEC. 70. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matters out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

Answer in such cases.

SEC. 71. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

In action to recover property distrained for damage — answer need not set forth title.

SEC. 72. In an action to recover the possession of property distrained, doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property.

What causes of action may be joined in same action.

SEC. 73. The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable or both, where they arise out of—

1. The same transaction or transactions connected with the same subject of action;

2. Contract, express or implied;

3. Injuries with or without force to person and property, or either; or,

4. Injuries to character; or,

5. Claims to recover real property with or without damages for the withholding thereof, and the rents and profits of the same; or,

6. Claims to recover personal property with or without damages for the withholding thereof; or,

7. Claims against a trustee by virtue of a contract, or by operation of law.

To what such causes must belong.

Sec. 74. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be stated respectively [separately.]

Allegation not denied when to be deemed true.

Sec. 75. Every material allegation of the complaint not controverted by the answer, as prescribed in section 54, and every material allegation of new matter in the answer constituting a counter claim, not controverted by the reply, as prescribed in section 59, shall, for the purposes of the action, be taken as true.

What matters deemed controverted without reply.

Sec. 76. But the allegation of new matter in the answer, not relating to a counter claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

CHAPTER VI.

Mistakes in Pleadings and Amendments.

Section 77. Material variances, how provided for.
78. Immaterial variances, how provided for.
79. What to be deemed a variance.
80. Amendments of course and after demurrer.
81. Amendments by the court.
82. General control of court over proceedings.
83. Suing a party by fictitious name, when allowed.
84. No error or defect to be regarded, unless it affects substantial rights.
85. Supplementary complaints, answer and reply.

Material variances—how provided for.

Sec. 77. No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defence upon its merits. Whereever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon

Immaterial variances—how provided for.

the court may order the pleading to be amended upon such terms as may be just.

What to be deemed a variance.

Sec. 78. Where the variance is not material as provided in the last section, the court may direct the fact to be found in accordance with the evidence, or may order an immediate amendment without costs.

Sec. 79. When, however, the allegation of the cause of action or defence to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

Amendments of course and after demurrer.

Sec. 80. Any pleading may be once amended by the party of course without costs, and without prejudice to the proceeding already had, at any time before the period for answering it expires, or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term or circuit for which it is or may be noticed, and if it appear to the court, that such amendment was made for that purpose, the same may be stricken out and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party. After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead on such terms as may seem just. If the demurrer be allowed for the cause mentioned in the 5th sub-division of section 49, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the cause of action therein mentioned.

Amendments by the court.

Sec. 81. The court may, before or after judgment, in furtherance of justice, and upon such terms as may be proper, amend any pleading or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

General control of court over proceeding.

SEC. 82. The court may likewise in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this act, or by an order enlarge such time; and may also in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertance or surprise, or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may in like manner and upon like terms, permit an amendment of such proceeding so as to make it conformable thereto.

Suing a party by fictitious name, when allowed.

SEC. 83. When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

No error or defect to be regarded unless it affects substantial rights.

SEC. 84. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Supplemental complaints, answer and reply.

SEC. 85. The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, demur or reply, or of which the party was ignorant when his former pleading was made.

TITLE 7.

Of the Provisional Remedy in Civil Action.

CHAPTER 1. Arrest and bail.
2. Claim and delivery of personal property.
3. Injunction.
4. Attachment.
5. Provisional remedies.

CHAPTER I.

Arrest and Bail.

SECTION 86. No person to be arrested except as prescribed by this act.
87. Cases in which defendant may be arrested.
88. Order for arrest, by whom made.
89. Affidavit to obtain order.
90. Security by plaintiff before order for arrest.
91. Order, when made, and its form.
92. Affidavit and order to be delivered to sheriff, and copy served on defendant.
93. Arrest, how made.
94. Defendant to be discharged on bail or deposit.
95. Bail, how given.
96. Surrender of defendant.
97. Bail may arrest and surrender.
98. Bail, how proceeded against.
99 Bail, how exonerated.
100. Delivery of undertaking to plaintiff and its acceptance or rejection by him.
101. Notice of justification and new undertaking of other bail.
102. Qualification of bail.
103. How to justify.
104. Allowance of undertaking.
105. Deposit of money with sheriff.
106. Payment of money by sheriff.
107. Substitution of bail for deposit.
108. Money deposited, how applied or disposed of.
109. Sheriff when liable as bail and his discharge from liability.
110. Proceeding against sheriff.
111. Bail liable to sheriff.
112. Motion to vacate, arrest or reduce bail.
113. Affidavits on motion.

No person to be arrested except as prescribed by this act.

SEC. 86. No person shall be arrested in a civil action except as prescribed by this act; but this provision shall not apply to proceedings for contempts.

Cases in which defendant may be arrested.

SEC. 87. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract where the defendant is not a resident of the state or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or for money received, or for property embezzled, or fraudulently misapplied by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker, or any person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover possession of personal property unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff.

But no female shall be arrested in any action except for a wilful injury to person, character or property.

Order for arrest--by whom made.

SEC. 88. An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge, or court commissioner.

Affidavit to obtain order.

SEC. 89. The order may be made where it shall appear to the judge or commissioner, by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 87.

Security by plaintiff before order for arrest.

SEC. 90. Before making the order, the judge or commissioner shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that, if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking, above all his debts and liabilities.

Order, when made and its form.

SEC. 91. The order may be made to accompany the summons, or at any time afterwards before judgment. It shall

require the sheriff of the county, where the defendant may be found, forthwith to arrest him, and hold him to bail in a specified sum, and to return the order at a time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or endorsed.

Affidavit and order to be delivered to the sheriff and copy served on defendant.

SEC. 92. The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.

Arrest, how made.

SEC. 93. The sheriff shall execute the order, by arresting the defendant, and keeping him in custody until discharged by law; and may call the power of the county to his aid in the execution of the arrest as in case of process.

Defendant to be discharged on bail or deposit.

SEC. 94. The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

Bail, how given.

SEC. 95. The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient bail, stating the places of residence and occupations, to the effect that the defendant shall, at all times, render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or if he be arrested for the cause mentioned in the third sub-division of section 57, an undertaking to the same effect as that provided by section 119.

SEC. 96. At any time before a failure to comply with their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

Surrender of defendant.

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall by a certificate in writing acknowledge the surrender.

2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court or county judge, or court commissioner, may, upon a notice to the plaintiff, of eight days, with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on such application, they shall be exonerated accordingly.

But this section shall not apply to the arrest for the causes mentioned in the third sub-division of section 57,

so as to discharge the bail from an undertaking given to the effect provided by section 119.

Bail may arrest and surrender.

SEC. 97. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

Bail, how proceeded against.

SEC. 98. In case of failure to comply with the undertaking, the bail may be proceeded against by action only.

Bail, how exonerated.

SEC. 99. The bail may be exonerated, either by the death of the defendant, or his imprisonment in a state prison, or by his discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

Delivery of undertaking to plaintiff.

SEC. 100. Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff or attorney, by whom it is subscribed, with his return endorsed, and a certified copy of the undertaking of the bail. The plaintiff within ten days thereafter, may serve upon the sheriff, a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.

Notice of justification and new undertaking if other bail.

SEC. 101. On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of justification of the same, or other bail, (specifying the places of residence and occupations of the latter) before a judge of the court, or county judge, or justice of the peace, at a specified time and place, the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section 95.

Qualifications of bail.

SEC. 102. The qualifications of bail must be as follows:

1. Each of them must be a resident, and householder or freeholder, within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution, but a judge, or a justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the

whole justification be equivalent to that of two sufficient bail.

How to justify.

SEC. 103. For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Allowance of undertaking.

SEC. 104. If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the court; and the sheriff shall thereupon be exonerated from liability.

Deposit of money with sheriff.

SEC. 105. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

Payment of money into court by sheriff.

SEC. 106. The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same two certificates of payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Substitution of bail for deposit.

SEC. 107. If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 101, any time before judgment; and thereupon the judge before whom the justification is had, shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.

Money deposited—how applied or disposed of.

SEC. 108. Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited, and remaining unapplied.

Sheriff when liable as bail and his discharge from liability.

SEC. 109. If after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail as provided in sections 101, 102, 103 and 104, at any time before process against the person of the defendant to enforce an order or judgment in the action.

Proceedings on judgment against sheriff

SEC. 110. If a judgment be recovered against a sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff to collect the delinquency, as in other cases of delinquency.

Bail liable to sheriff.

SEC. 111. The bail taken upon the arrest, shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.

Motion to vacate arrest or reduce bail.

SEC. 112. A defendant arrested may, at any time before the justification of bail, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

Affidavits on motion.

SEC. 113. If the motion be made upon affidavit on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavit or other proof, in addition to those on which the order or arrest was made.

CHAPTER II.

Claims and delivery of personal property.

SECTION 114. Delivery of personal property, when it may be claimed.
115. Affidavit and its requisites.
116. Requisition to sheriff to take and deliver the property.
117. Security on part of the plaintiff and justification.
118. Exception to sureties and proceedings thereon or on failure to accept.
119. Defendant when entitled to re-delivery.
120. Justification of defendant's sureties.
121. Qualification and justification of sureties.
122. Property, how taken when concealed in building or enclosure.
123. Property, how kept.
124. Claim of property by third person and proceeding thereon.
125. Notice and affidavit, when and where to be filed.

Delivery of personal property, when it may be claimed.

SEC. 114. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

Affidavit and its requisites.

SEC. 115. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one on his behalf, showing:

1. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; and

5. The actual value of the property.

Requisition to sheriff to take and deliver the property.

SEC. 116. The plaintiff may thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff.

Security on part of the plaintiff and justification.

SEC. 117. Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Exception to sureties, proceedings thereon or on failure to accept.

SEC. 118. The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify, on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

Defendant when entitled to re-delivery.

SEC. 119. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound, in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the sheriff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 124.

Justification of defendant's securities.

SEC. 120. The defendant's sureties, upon a notice to the plaintiff, of not less than two nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed, or expressly waived, and may retain the property until that time, but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Qualification and justification of sureties.

SEC. 121. The qualification of sureties and their justification shall be as prescribed by sections 109 and 103, in respect to bail upon an order of arrest.

Property, how taken when concealed in building or enclosure.

SEC. 122. If the property or any part thereof be concealed in a building or enclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or enclosure to be broken open and take the property into his possession; and if necessary he may call to his aid the power of his county.

Property—how kept.

SEC. 123. When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Claim of property by third person and proceedings thereon.

SEC. 124. If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto, and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, shall indemnify the sheriff against such claim by an undertaking, executed by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent, shall be valid against the sheriff unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

Notice and affidavit—when and where to be filed.

SEC. 125. The sheriff shall file the notice and affidavit with the proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

CHAPTER III.

Injunction.

SECTION 126. Injunction may be in form of an order.
127. Injunction, in what cases granted.
128. At what time it may be granted and upon what granted.
129. Notice, when required. Temporary injuction.
130. Security upon injunction and damages thereon, how ascertained.
131. Order to show cause why injuction should not be granted.
132. Security upon injunction to suspend business of corporation.
133. Motion to vacate or modify injunction.
134. Affidavits on motion.

Injunction may be in the form of the order.

SEC. 126. The writ of injunction may be in the form of an order as prescribed in this act. The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge or court commissioner, in the cases provided in the next section; and, when made, may be enforced as the order of the court.

Injunction in what cases granted.

SEC. 127. Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when, during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

At what time it may be granted and upon what granted.

SEC. 128. The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, upon its appearing satisfactorily to the court or judge, or court commissioner, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

Notice when required—temporary injunction.

SEC. 129. An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained, until the decision of the court or judge, granting or refusing the injuction.

Security upon injunction and damages thereon—how ascertained.

SEC. 130. Where no provision is made by statute, as to security upon an injunction, the court or judge or commissioner shall require a written undertaking, on the part of the plaintiff, with or without securities, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct.

Order to show cause why injunction should not be granted.

SEC. 131. If the court or judge or commissioner deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made, requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Security upon injunction to suspend business of corporation.

SEC. 132. An injunction to suspend the general and ordinary business of a corporation, shall not be granted, except by the court or judge thereof; nor shall it be granted without due notice of the application therefor, to the proper officers of the corporation, except where the people of this state are a party to the proceeding, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect, that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain, by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

Motion to vacate or modify injunction.

SEC. 133. If the injunction be granted by a judge of the court, or by a county judge, or court commissioner, without notice, the defendant, at any time before the trial, may apply, upon notice, to the judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted or upon affidavits on the part of the defendant, with or without the answer.

Affidavits on motion.

SEC. 134. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

CHAPTER IV.

Attachments.

SECTION 135. Attachments, when may issue and in what cases.
136. Warrant of attachment and by whom granted.
137. In what cases warrant may be issued.
138. Security on attachment.
139. Warrant, to whom directed and what to require.
140. Mode of proceeding in executing warrant.
141. Proceeding in case of perishable property or vessels.
142. Interest in corporation or association liable to attachment.
143. Attachment, how executed on property incapable of manual delivery.
144. Certificate of defendant's interest to be furnished by corporation.
145. Judgment, how satisfied.
146. When action to recover note &c, attached, may be prosecuted by the plaintiff in the action in which the attachment issued.
147. Bond to sheriff on attachment, how disposed of on judgment for defendant.
148. Discharge of attachment and return of property or its proceeds to defendant.
149. Undertaking on the part of the defendant in such cases.
150. When and how sheriff to return warrant.
151. Sheriff's fees.
152. Motion to set aside attachment for insufficiency, and affidavits, and proceedings for that purpose.

Attachments, when may issue and in what cases.

SEC. 135. In an action for the recovery of money against a corporation created by or under the laws of any other state, government, or country, or against a defendant who is not a resident of this state, or against a defendant who has absconded or concealed himself; or

When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought; or

When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendant attached in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.

Warrant of attachment and by whom granted.

SEC. 136. A warrant of attachment must be obtained from a judge of the court in which the action is brought or from a county judge or court commissioner.

In what cases warrant may be issued.

SEC. 137. The warrant may be issued whenever it shall appear, by affidavit, that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and that the case is one of those mentioned in section 135.

Security on attachment.

SEC. 138. Before issuing the warrant, the judge or commissioner shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

Warrants, to whom directed and what to require.

SEC. 139. The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the sheriffs of different counties.

Mode of proceeding in executing warrant.

SEC. 140. The sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon in all respects in the manner required of him by law, in case of attachments; shall make and return an inventory, and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action; and shall, subject to the direction of the court or judge, collect and receive into his possession all debts, credits and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name, or in the name of such defendant, as may be necessary for that purpose, and dis-

continue the same at such times, and on such terms as the court or judge may direct.

Proceeding in case of perishable property or vessels.

SEC. 141. If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments.

Interest in corporation and associations liable to attachment.

SEC. 142. The right or shares which such defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this state of such defendant, shall be liable to be attached and levied upon and sold to satisfy the judgment and execution.

Attachment—how executed on property incapable of manual delivery.

SEC. 143. The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

Certificates of defendants interest to be furnished by corporation.

SEC. 144. Whenever the sheriff shall with a warrant of attachment or execution against the defendant, apply to such officer, debtor or individual for the purpose of attaching or levying upon such property, such officer, debtor or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation or individual, for the benefit of or debt owing to the defendant. If such officer, debtor or individual refuse to do so, he may be required by the court or judge, to attend before him and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

Judgment—how satisfied.

SEC. 145. In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose;

By paying over avails of sales of perishable property.

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel or share or interest in any vessel sold by him, or of any debts or

credits collected by him, or so much as shall be necessary to satisfy such judgment.

By issuing execution against attached property.

2. If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution, so much of the attached property, real or personal, except as provided in sub-division four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares, in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant.

Rights or shares in corporations, how disposed of.

Sheriff may repossess himself of all property attached.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose have all the authority which he had to seize the same under the attachment, and any person who shall wilfully conceal or withhold such property from the sheriff shall be liable to double damages at the suit of the party injured.

Sheriff may collect notes and accounts attached.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidence of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment

When the judgment and all costs of the proceedings shall have been paid, the sheriff upon reasonable demand shall deliver over to the defendant the residue of the attached property or the proceeds thereof.

When actions to recover note, &c., attached, may be prosecuted by the plaintiff in the action in which the attachment issued.

SEC. 146. The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect, that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit, that each is a householder and worth double the amount of the penalty of the bond over and above all demands and liabilities.

Bond to sheriff on attachment —how disposed of on judgment for defendant.

SEC. 147. If the foreign corporation, or absent, or absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales, and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.

Discharge of attachment and return of property or its proceeds to defendant.

SEC. 148. Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and if the same be granted, all the proceeds of sales, and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.

Undertaking on the part of defendant in such cases.

SEC. 149. Upon such application, the defendant shall deliver to the court, or officer, an undertaking, executed by at least two sureties, resident, and freeholders in this state, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint.

When and how sheriff to return warrant.

SEC. 150. When the warrant shall be fully executed or discharged, the sheriff shall return the same with his proceedings thereon, to the court in which the action was brought.

Sheriff's fees.

SEC. 151. The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements under this title as are allowed by law for like services in other cases.

Motion to set aside attachment for insufficiency and affidavits and proceedings for that purpose.

SEC. 152. The defendant may, at any time before the time to answer expires, make a motion before the circuit judge of the proper circuit, to set aside or discharge the attachment, on the ground that sufficient cause for the granting of the same did not exist. Such motion may be made upon the affidavit for the attachment or additional affidavits, on the part of the defendant, controverting the grounds upon which the attachment was issued, and in case the defendant uses additional affidavits, the plaintiff may use additional affidavits, on his part, to sustain the same, and the plaintiff may, on reasonable notice for that

purpose given, require the defendant or other person to appear on the hearing of such motion, and be examined orally, touching the grounds upon which said attachment was issued; and if the defendant neglect or refuse to attend as required, the motion to discharge the attachment shall be denied.

CHAPTER V.

Other Provisional Remedies.

SECTION 153. Powers of court as to receivers.
154. Deposit of money or other property in court.
155. Court may order property or money deposited to be delivered or conveyed, or may pass title to real estate by judgment.
156. When answer admits part of plaintiff's claim, court, on motion, may order defendant to satisfy that part.

Powers of court as to receivers.

SEC. 158. A receiver may be appointed:

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired.

2. After judgment to carry the judgment into effect.

3. After judgment to dispose of the property according to the judgment or to preserve it during the pendancy of an appeal; or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In the cases provided in this code, and by special statutes, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights.

5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act.

Deposit of money or other property in court.

SEC. 154. When it is admitted by the pleading or examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which being the subject of the litigation, is held by him as trustee for another party, or which belongs, or is due

to another party, the court may order the same to be deposited in court, or delivered to such party with or without security, subject to the further direction of the court.

Court may order property or money deposited, to be delivered or conveyed, or may pass title to real estate by judgment.

SEC. 155. Whenever in the exercise of its authority, a court shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver or convey it in conformity with the direction of the court, or the court may pass title to real estate by its judgment, without conveyance, in like manner, as may now be done by decree.

When answer admits part of plaintiff's claim, court on motion, may order defendant to satisfy that part.

SEC. 156. When the answer of the defendant admits part of the plaintiff's claim to be just, the court on motion, may order such defendant to satisfy that part of the claim, and may enforce the order, as it enforces a provisional remedy.

TITLE 8.

Of the trial and judgment in civil actions.

CHAPTER 1. Judgment upon failure to answer.
2. Issue and mode of trial.
3. Trial by jury.
4. Trial by the court.
5. Trial by referees.
6. Manner of entering judgment.

CHAPTER I.

Judgment upon failure to answer.

SECTION 157. Judgment, what.
158. Judgment on failure of defendant to answer.
159. Judgment on frivolous demurrer, answer or reply.

Judgment—what.

SEC. 157. A judgment is the final determination of the rights of the parties in the action.

Judgment on failure of defendant to answer.

SEC. 158. Judgment may be had if the defendant fail to answer the complaint, as follows:

Action on contract.

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants, or of the summons, according to the provisions of section 35, and that no answer has been received. The clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant or defendants, or against one or more of several defendants, in the cases provided for in section 41. But if the complaint be not sworn to, and such action is on an instrument for the payment of money only, the clerk, on its production to him, shall assess the amount due to the plaintiff thereon; and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action from his examination under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to five days notice of the time and place of such assessment.

In other actions.

2. In other actions, the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking an account or the proof of any fact be necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account, or hear the proof, or may in its discretion, order a reference for that purpose. And where the action is for the recovery of money only, or of specific, real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or if the examination of a long account be involved, by a reference as above provided. In case the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days notice of the time and place of application to the court for the relief demanded by the complaint,

Cases of publication of summons.

3. In actions where the service of the summons was by publication, the plaintiff may in like manner apply for judgment, and the court shall thereupon cause proof to be taken of the demand mentioned in the complaint, and in case the defendant is a non-resident, shall cause the plaintiff or his agent to be examined on oath, as to any payment that may have been made to such plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to

recover, and before entering judgment, the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives, shall apply and be admitted to defend the action and shall succeed in such defence.

Judgment on frivolous demurrer, answer or reply.

SEC. 159. If a demurrer, answer or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.

CHAPTER II.

Issue and mode of trial.

SECTION 160. The different kinds of issue.
161. Issue of law.
162. Issue of fact.
163. Issue of both law and fact, the issue of law to be tried first.
164. Trial defined.
165. Issues, how tried.
166. Either party may give notice of trial and note of issue.
167. Order of disposing of issues on the calendar.

The different kinds of issue.

SEC. 160. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and controverted by the other; they are of two kinds:

1. Of law.
2. Of fact.

Issue of law.

SEC. 161. An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Issue of fact.

SEC. 162. An issue of fact arises,

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer controverted by the reply; or,
3. Upon new matter in the reply, except an issue of law is joined thereon.

Issue of both law and fact, the issue of law to be first tried.

SEC. 163. Issues both of law and of fact may arise upon different parts of the pleadings in the same action; in such cases the issue of law must be first tried, unless the court otherwise direct.

Trial defined.

SEC. 164. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Issues—how tried.

SEC. 165. An issue of law must be tried by the court, unless it be referred as provided in sections 180 and 181. An issue of fact in an action for the recovery of money only, or of specific, real or personal property, or for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in sections 176 and 181. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it as provided in sections 180 and 181.

Either party may give notice of trial and note of issue.

SEC. 166. At any time after issue, and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least four days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

Order of disposing of issues on the calendar.

SEC. 167. The issues on the calendar shall be disposed of in the following order, unless for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

CHAPTER III.

Trial by jury.

SECTION 168. Party noticing for trial may proceed with the case.
Separate trials.
169. Court to be furnished with copy pleading.
170. General and special verdicts defined.
171. When jury may render general or special verdict, and when court may direct special finding.
172. Special finding shall control general verdict.
173. Jury to assess damages in certain cases.
174. Entry of the verdict. Motion for a new trial.
175. Motion for a new trial, when to be heard.

Party noticing for trial may proceed with the case.

SEC. 168. Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint or a verdict or a judgment as the case may require. A separate trial between the plaintiff and any of the several defendants may be allowed by the court whenever in its opinion justice will be thereby promoted.

Separate trials.

Court to be furnished with copy pleadings.

SEC. 169. When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of the defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings, and the offer of the defendant, the same may be furnished by the defendant.

General or special verdict defined.

SEC. 170. A general verdict is that by which the jury pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

When jury may render general or special verdict, and when court may direct special finding.

SEC. 171. In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer, claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant that he is entitled to a return thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which

the prevailing party has sustained by reason of the detention, or taking and withholding such property. In every action for the recovery of money only, or specific real property, the jury in their discretion may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered upon the minutes.

Special findings shall control general verdict.

SEC. 172. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

Jury to assess the damages in certain cases.

SEC. 173. When a verdict is found for the plaintiff in an action of the recovery of money, or for the defendant, when a set off for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also under the direction of the court, assess the amount of the recovery when the court give judgment for the plaintiff on the answer. If a set off established at the trial exceed the plaintiff's demand, so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Entry of the verdict.

SEC. 174. Upon receiving a verdict the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict. If an exception be taken it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled as provided by the rules of the court, and then stated in writing, in a case or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court or

a judge thereof. The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes, to set aside a verdict, and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or circuit, at which the trial is heard.

Motion for a new trial.

When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form upon which the argument of the appeal must be had.

Motion for a new trial—when to be heard.

SEC. 175. A motion for a new trial on a case or exceptions or otherwise, and an application for judgment on a special verdict or case reserved for argument or further consideration, or to set aside the report of referees, must, in the first instance, be heard and decided at the circuit, at special term, or at a regular term.

CHAPTER IV.

Trial by the Court.

SECTION 176. Trial by jury, how waived.
177. On trial by the court, judgment to be given in twenty days, and what decision to contain.
178. Exceptions, how and when taken.
179. Proceedings upon judgment on issue of law.

Trial by jury, how waived.

SEC. 176. Trial by jury may be waived by the several parties, to an issue of fact, in actions on contract, with the assent of the court, in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person, or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

On trial by the court, judgment to be given in twenty days—and what decision to contain.

SEC. 177. Upon a trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly, and the judge shall state in his decision separately:

1. The facts found by him, and
2. His conclusions of law thereon.

Exceptions—how and when taken.

SEC. 178. For the purpose of an appeal, either party may except to a decision on a matter of law, arising on such trial, within ten days after notice, in writing, of the judgment in the same manner and with the same effect as upon a trial by jury. And either party desiring a review upon the evidence appearing upon the trial, either of the questions of fact or of the law, may, within ten days after the notice of such judgment, or within the time prescribed by the rules of the court, make a case or exceptions in like manner as upon trials by jury; except that the judge, in settling the matter, must briefly specify the facts found by him, and his conclusions of law.

Motion for a new trial.

Motion for a new trial—

Proceedings upon judgment on issue of law

SEC. 179. On a judgment for the plaintiff, upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two subdivisions of section 198, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference or assessment by a jury may be ordered, as in that section provided.

Trial by the Court.

Section 176. Trial by jury, how waived.

177. On trial by the court, judgment to be given in

[illegible] decision to contain.

178. Exceptions, how and when taken.

179. Proceeding upon judgment on issue of law.

CHAPTER V.

Trial by Referees

SECTION 180. All issues referrable by consent.

181. When reference may be ordered by court.

182. Mode of trial, motion to set aside report, when motion made and proceeding for that purpose.

183. Referees, how chosen.

Trial by jury, how waived.

All issues referrable by consent.

SEC. 180. All or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties.

When references may be made by court, what decision to contain.

SEC. 181. Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

1. Where the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect, or

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

Mode of trial.

SEC. 182. The trial by referees is conducted in the same manner and on similar notice, as a trial by the court; they have the same power to grant adjournments as the court upon such trial.

Motion to set aside report.

They must state the facts found and the conclusions of law separately, and their decision must be given and may be excepted to and reviewed in like manner, and by a motion before the circuit court to set aside the report upon a case or bill of exceptions, to be settled by the referees as in cases of trial by the court, and on which motion the court may set aside such report or alter or modify the same, and the judgment entered upon such report under direction of the circuit court may be appealed from to the supreme court in like manner as judgments upon motions for a new trial on cases or exceptions as provided in section 175.

Judgment may be for or against any of the parties.

When motion made and proceedings for that purpose.

The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court, unless either party may desire to make a motion to set aside the report, as herein provided. And in case either party desires to make such a motion, a judge of the circuit court may stay the entry of judgment for twenty days, to enable the party to prepare his case or bill of exceptions, and in case it is prepared, all proceedings on the report shall be stayed until the decision of the circuit court thereon, or the case is set aside or dismissed. When the reference is to report the facts, the report has the effect of a special verdict.

Referees—how chosen.

SEC. 183. In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

CHAPTER VI.

Manner of entering judgment.

SECTION 184. Judgment may be for or against any of the parties.
185. The relief to be awarded to the plaintiff.
186. Rates of damages where damages are recoverable.
187. Judgment in action for recovery of personal property.
188. Judgment to be entered by direction of circuit judge, or report of referees.
189. Clerk to keep a judgment book.
190. Judgment to be entered in judgment book.
191. Judgment roll, of what composed.
192. Judgment, when and how to be docketed.

Judgment may be for or against any of the parties.

SEC. 184. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves, and may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

The relief to be awarded to the plaintiff.

SEC. 185. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Rates of damages where damages are recoverable.

SEC. 186. Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action.

Judgment in action for recovery of personal property

SEC. 187. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property have been delivered

to the plaintiff and a defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Judgment to be entered by direction of circuit judge or report of referees.

SEC. 188. Judgment upon an issue of law or of fact or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same by the first subdivision of section one hundred and fifty-eight, [158] and by section two hundred and eighty-eight,) shall, in the first instance, be entered upon the direction of a circuit judge, or report of referees, subject to review on the demand of either party, as herein provided.

Clerk to keep judgment book.

SEC. 189. The clerk shall keep among the records of the court, a book for the entry of judgments to be called the "judgment book."

Judgment to be entered in judgment book

SEC. 190. The judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action.

Judgment roll, of what composed.

SEC. 191. Unless the party or his attorney shall furnish a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons and complaint or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

Judgment, when and how to be docketed.

SEC. 192. On filing a judgment roll, upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the circuit court of the county where it was rendered, and in any other county, upon filing with the clerk of the circuit court thereof a transcript of the original "docket," and shall be a lien on the real property in the county where the same is docketed, of every person against whom such judgment shall be rendered, and which he may have at the time of docketing thereof, in the county in which such real estate is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same, in the county where it was rendered. But whenever an appeal from any judgment shall be pending,

and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the code, the court in which such judgment was recovered, may, on special motion, after notice to the person owning the judgment, on such terms as they shall see fit, direct an entry to be made by the clerk on the docket of said judgment, that the same is secured on appeal, and thereupon it shall cease, during the pendency of the appeal, to be a lien on the real property of the judgment debtor, as against purchasers and mortgagees in good faith.

TITLE 9.

Of the Execution of the Judgment in Civil Actions.

CHAPTER 1. The execution.
2. Proceedings supplementary to execution.

CHAPTER 1.

The Execution.

SECTION 193. The execution to be issued within two years of course.
194. After two years to be issued only by leave of court, and leave how obtained.
195. Other judgments, how enforced, court may pass title by judgment.
196. The different kinds of execution.
197. To what counties execution may be issued.
198. Execution against the person, in what cases and when.
199. Form of the execution.
200. To be returnable within sixty days.
201. Existing laws relating to execution continued until otherwise provided.

Execution to be issued within two years of course.

SEC. 193. Writs of execution for the enforcement of judgments as now used, are modified in conformity to this title, and the party in whose favor judgment heretofore or shall hereafter be given, may, at any time

within two years after the entry of judgment, proceed to enforce the same, as prescribed by this title.

After two years from entry of judgment, execution issued only by leave of court, and leave how obtained.

SEC. 194. After the lapse of two years from the entry of judgment, an execution can be issued only by the leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which case, such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. When the judgment shall have been rendered in a court of justice of the peace, and docketed in the office of the clerk of the circuit court, the application for leave to issue execution must be to the court where judgment is docketed.

Other judgments—how enforced—court may pass title by judgment.

SEC. 195. Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required to obey the same, and his obedience thereto enforced. If he refuse he may be punished by the court as for a contempt.

The different kinds of executions.

SEC. 196. There shall be three kinds of execution, one against the property of the judgment debtor, another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, but they need not be sealed nor subscribed, except as prescribed in section 189.

To what counties execution may be issued.

SEC. 197. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties. Real property adjudged to be sold, must be sold in the county where it lies, by the sheriff of that county or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee shall execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interest of the parties adjudged to be sold.

Execution against the person, in what cases and when.

SEC. 198. If the action be one in which the defendant might have been arrested as provided in section 87 and section 89, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part.

Form of execution.

SEC. 199. The execution must be directed to the sheriff or coroner, when the sheriff is a party, or interested subscribed by the party issuing it or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the officer to satisty the judgment out of the personal property of such debtor, and if sufficient personal property cannot be found out of the real property belonging to him on the day when the judgment was docketed in the county or at any time thereafter.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor and commit him to the jail of the county, until he shall pay the judgment, or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs, damages, or rents and profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recoverd, to be specified therein, if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or

at any time thereafter, and shall, in that respect, be deemed an execution against property.

To be returnable within sixty days.

SEC. 200. The execution shall be returnable within sixty days after its receipt by the officer, to the clerk with whom record of judgment is filed,

Existing laws relating to executions continued, until otherwise provided.

SEC. 201. Until otherwise provided by the legislature, the existing provisions of law, not in conflict with this chapter, relating to executions, and their incidents, the property liable to sale on execution, including the sale and redemption of property, the powers and rights of officers, their duties thereon, and the proceeding to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

CHAPTER II.

Proceedings Supplementary to the Execution.

SECTION 202. When execution returned unsatisfied, order for discovery of property allowed. Also, when judgment debtor refuses to apply property to satisfy judgment.
203. Manner of proceeding to examine judgment debtor.
204. Any debtor may pay execution against his creditor to sheriff.
205. Examination of debtors or of those having property belonging to them.
206. Witnesses required to testify.
207. Compelling party or witnesses to attend.
208. What property may be ordered to be applied to the execution.
209. Judge may appoint a receiver, and prohibit transfer of property.
210. Proceedings upon claim of another party to property or a denial of indebtedness to judgment debtor.
211. Reference by judge.
212. Costs of proceedings,
213. Disobedience of order, how punished.

When execution returned unsatisfied, order for discovery of property

SEC. 202. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he do not reside in the state, to the sheriff

allowed; also, when judgment debtor refuses to apply property to satisfy judgment.

of a county where a judgment roll or a transcript of a justice's judgment for ten dollars or upwards, exclusive of costs, is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from the judge of the court or a county judge, or court commissioner of the county to which the execution was issued, requiring such judgment debtor to appear and answer concerning his property before such judge, at a time and place specified in the order, within the county to which the execution was issued. After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the court, or a judge thereof, a county judge, or a court commissioner, that any judgment creditor [debtor] residing in the county where such judge or officer resides, has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear, at a specified time and place, to answer concerning the same, and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment, as are provided upon the return of an execution. On an examination under this section, either party may examine witnesses on his behalf, and the judgment debtor may be examined in the same manner as a witness. Instead of the order requiring the attendance of judgment debtor, the judge may, upon proof by affidavit, or otherwise, to his satisfaction, that there is danger of the judgment debtor's leaving the state, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge.

Manner of proceeding to examine judgment debtor.

SEC. 203. Upon being brought before the judge, he may be examined on oath, and if it then appears that there is danger of the debtor's leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the judge as he shall direct, and that he will not during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking,

he may be committed to prison by warrant of the judge as for a contempt. No person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

Any debtor may pay execution against his creditor to sheriff.

SEC. 204. After the issuing of execution against property, any person indebted to the judgment debtor, may pay to the sheriff, the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Examination of debtors or of those having property belonging to them.

SEC. 205. After the issuing or return of an execution against property of the judgment debtor or any one of several debtors in the same judgment, and upon an affidavit, that any person, or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding, to be given to any party to the action in such manner as may seem to him proper.

Witness required to testify.

SEC. 206. Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

Compelling party and witnesses to attend.

SEC. 207. The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge; all examinations and answer before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on oath of an officer thereof.

What property may be ordered to be applied to the execution.

SEC. 208. The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment, except that the earnings of the debtor, for his personal services, at any time within sixty days next preceding the order, can not be so applied, when it is made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family, supported wholly or in part by his labor.

Judge may appoint receiver, and prohibit transfer of property.

SEC. 209. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner and with the like authority, as if the appointment was made by the court, according to section 152. But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are so pending against the judgment debtor; the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to such receivership.

No more than one receiver of the property of a judgment debtor shall be appointed. The judge may also by order forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution and any interference therewith.

Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.

SEC. 210. If it appear that a person or corporation, alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property, adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver, but the judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved, by the judge granting the same, at any time, on such security as he shall direct.

Reference by judge.

SEC. 211. The judge may, in his discretion, order a reference to a referee agreed upon or approved by him, to report the evidence or the facts.

Costs of proceeding.

SEC. 212. The judge may allow to the judgment creditor or to any party so examined, whether a party to the action or not, witnesses fees and disbursments, and a fixed sum in addition not exceeding fifteen dollars as costs.

Disobedience of order, how punished.

SEC. 213. If any person, party or witness, disobey an order of the judge or referee duly served, such person, party or witness may be punished by the judge as for a contempt, and in all cases of commitment, under this chapter, the person committed, may, in case of inabilty to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

TITLE 10.

Of the Costs in Civil Actions.

SECTION 214. Fee bill abolished, allowances given termed costs.
215. When allowed, of course to plaintiff.
216. When allowed to defendant.
217. When allowed to either party in the discretion of the court.
218. Amount of costs allowed.
219. Additional allowance of a per centage on the recovery
220. Per centage, how computed.
221. Interest on verdict or report, when allowed.
222. Costs, how to be inserted in judgment.
223. Referees fees.
224. Costs on postponement of trial.
225. Costs on motion.
226. Costs against infant plaintiff.
227. Costs in an action by or against an executor, administrator, or trustee of an express trust or a person expressly authorized by statute to sue.
228. Costs against assignee of cause of action after action brought.
229. Costs on a settlement.

Fee bill abolished; allowances given, termed costs.

SEC. 214. All statutes establishing or regulating the costs or fees of attorneys, solicitors and councel in civil actions, and all existing rules and provisions of law restricting or controling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity, for his expenses in the actions, which allowances are in this act termed costs.

When allowed of course to plaintiff.

SEC. 215. Costs shall be allowed of course to the plaintiff, upon a recovery in the following cases:

1. In an action for the recovery of real property, or when a claim of title to real property arises on the proceedings, or is certified by the court to have come in question at the trial.

2. In an action to recover the possession of personal property.

3. In the actions of which, according to law, a court of justice of the peace has no jurisdiction.

4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars or more. But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages; and in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which, with the damages, amounts to fifty dollars.

Such value must be determined by the jury, court or referee, by whom the action is tried.

When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument, in writing, or in any other case, for the same cause of action, against several parties who might have been joined as defendant in the same action, no costs, other than disbursements, shall be allowed to the plaintiff, in more than one of such actions, which shall be at his election, provided that the party or parties proceeded against in such other action or actions, shall, at the time of the commencement of the previous action or actions have been within this state, and not secreted.

When allowed to defendants.

SEC. 216. Costs shall be allowed of course to the defendant in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein.

When allowed, to either party in the discretion of the court.

SEC. 217. In other actions costs may be allowed or not, in the discretion of the court.

Where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them.

In the following cases the costs of the appeal shall be in the discretion of the court:

1. Where a new trial shall be ordered;

2. Where a judgment shall be affirmed in part and reversed in part.

Amount of costs allowed.

SEC. 218. When allowed, costs shall be as follows:

1. To the plaintiff for all proceedings before notice of

trial (including judgment when entered), in an action where judgment upon failure to answer may be had without application to court, seven dollars. In an action when judgment can only be taken on application to the court, twelve dollars. For all subsequent proceedings before trial, seven dollars.

2. To the defendant, for all proceedings before notice of trial, five dollars; for all subsequent proceedings before trial, seven dollars.

3. For the trial of issues of law, if separate from the trial of issues of fact, to the plaintiff five dollars; to the defendant five dollars.

4. For the trial of issues of fact, if separate from the trial of the issues of law, to the plaintiff five dollars; to the defendant five dollars.

5. For the trial of issues of fact and of law, when tried at the same time, to the plaintiff ten dollars; to the defendant ten dollars.

6. To either party on appeal to the supreme court, fifteen dollars. Appeals from orders to the circuit court to either party, five dollars.

7. The plaintiff may, in all cases, recover costs and disbursments in suits against non-residents when he has attached real estate without regard to the amount of the recovery, at and after rates allowed by this act.

Additional allowance of a per centage on the recovery or claim.

SEC. 219. In addition to these allowances, if the action be for the recovery of money, or of real or personal property, and a trial has been had, the court may, in difficult or extraordinary cases, make an allowance of not more than ten per cent. on the recovery or claim, as in the next section prescribed, for any amount not exceeding five hundred dollars; and not more than five per cent. for any additional amount.

Such allowance may likewise be made upon the recovery of judgment in any action for the partition of real property, or for the foreclosure of a mortgage, or in which a warrant of attachment has been issued, or for the construction of a will or other instrument in writing, and on proceedings to compel the determination of claims to real property, and also in any case where the prosecution or defence has been unreasonably or unfairly conducted.

SEC. 220. These rates shall be estimated as follows:

Per centage, how computed.

1. If the plaintiff recover judgment, it shall be upon the amount of money or the value of the property recovered, or claimed, or attached, or affected by the construc-

tion of the will, or sought to be partitioned, or the amount found due upon the mortgage, in an action for foreclosure.

2. If the defendant recover judgment, it shall be upon the amount of money, or the value of the property claimed by the plaintiff, or attached, or affected by the construction of the will, or if the defendant's interest in property sought to be partitioned or the amount claimed in an action for foreclosure, such amount of value must be determined by the jury, court or referees, by whom the action is tried, or judgment rendered, or the commissioners appointed to make partition in an action therefor.

Interest on verdict or report, when allowed.

SEC. 221. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

Costs, how to be inserted in judgment.

SEC. 222. The clerk shall insert in the entry of judgment, on the application of the prevailing party, upon two days' notice to the other, the sum of the charges for costs, as above provided, and the necessary disbursements and fees of officers allowed by law, including the compensation of referees, and the expense of printing the papers upon any appeal. The disbursements shall be stated in detail, and verified by affidavits, which shall be filed.

Referees' fees.

SEC. 223. The fees of referees shall be three dollars to each per day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation.

Costs on postponement of trial.

SEC. 224. When an application shall be made to a court or referees, to postpone a trial, the payment, to the adverse party, of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponment.

Costs on motion.

SEC. 225. Costs may be allowed on a motion, in the discretion of the court, not exceeding ten dollars.

Costs against infant plaintiff.

SEC. 226. When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor, and payment may be enforced by attachment.

Costs in an action by or against an executor, administrator, or trustee of an

SEC. 227. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right, but such costs shall be

chargeable only upon or collected of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors and administrators where they are now exempt by law.

express trust or a person expressly authorized by statute to sue

SEC. 228. In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment.

Costs against assignee of cause of action after action brought.

SEC. 229. Upon the settlement, before judgment, of any action mentioned in section 215, no greater sum shall be demanded from the defendant as costs, than at the rate prescribed in section 218.

Costs on settlement.

TITLE 11.

Of Appeals in Civil Actions.

CHAPTER 1. Appeals in general.
2. Appeals to the supreme court from judgments.
3. Appeals to the circuit court or county court on justices' judgments.

CHAPTER 1.

Appeals in general.

SECTION 230. Appeals may be taken instead of writs of error.
231. Orders made out of court, how vacated or modified.
232. Who may appeal.
233. Appeal, how made.
234. Clerk to transmit papers to appellate court.
235. What may be received by appellate court.
236. Judgment on appeal.
237. In what cases appeal taken to supreme court.
238. Within what time taken.
239. Appeal from orders, and what orders may be appealed from.
240. No appeal to supreme court from order of chambers, unless affirmed by circuit court.
241. Appeals from order dissolving or discharging attachment or injunction, when taken and what security.
242. Appeals from orders at chambers to circuit court and order for that purpose, how entered.
243. Injunctions or attachments not to be dissolved at chambers by any other than a circuit judge.

ppeals may taken instead of writs error.

SEC. 230. It shall not be necessary to issue a writ of error to bring up any judgment or order for review before the supreme court, but the same may be reviewed as prescribed by this act by a proceeding which is hereby denominated an appeal, and the parties to such proceeding shall be known as appelant and respondent.

Orders made out of court, how vacated or modified.

SEC. 231. An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

Who may appeal.

SEC. 232. Any party aggrieved, may appeal in the cases prescribed in this title.

Appeal, how made.

SEC. 233. An appeal must be made by the service of a notice in writing, on the adverse party, and on the clerk, with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. When a party shall give in good faith notice of appeal from a judgment or order, and shall omit through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just

Clerk to transmit papers to appelate court

SEC. 234. Upon an appeal allowed by this act to the supreme court from a judgment, the clerk with whom the notice of appeal is filed, shall at the expense of the appellant, forthwith transmit to the supreme court, the judgment roll, unless the circuit court shall direct a certified copy of the judgment roll to be transmitted, instead of the original, and on an appeal allowed from an order by this act to the supreme court, the clerk with whom the notice of appeal is filed, and the order entered, shall forthwith transmit to the supreme court a certified copy of the order, the notice of appeal, and the papers upon which the order was granted.

What may be reviewed by appelate court.

SEC. 235. Upon an appeal from a judgment, the court may review an intermediate order, involving the merits and necessarily affecting the judgment.

Judgment on appeal.

SEC. 236. Upon an appeal from a judgment or order the supreme court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties and may if necessary or proper, order a new trial. When the judgment or order is reversed or modified, the supreme court shall remit its judgment or decision to be enforced accordingly.

In what cases appeal taken to the supreme court.

SEC. 237. Appeals to the supreme court shall be taken from circuit courts, and from county courts in common law cases, and from any court of record having common law jurisdiction where no other court of appeal is provided by law.

Within what time taken.

SEC. 238. Appeals may be taken to the supreme court from judgments in civil actions, within two years from entry thereof; and from orders made by the circuit court within thirty days' after notice of the same.

Appeal from orders, and what orders may be appealed from.

SEC. 239. The following orders may be carried by appeal to the supreme court:

1. An order affecting a substantial right made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken.

2. A final order affecting a substantial right made in special proceedings, or upon a summary application in an action after judgment.

3. When an order grants or refuses, continues or modifies a provisional remedy, or grants, refuses or dissolves an injunction or attachment, when it grants or refuses a new trial, or when it sustains or over-rules a demurrer: or

4. When it involves the merits of an action, or some part thereof.

No appeal to supreme court from order at chambers, unless affirmed by circuit court.

SEC. 240. No appeal shall be taken to the supreme court from an order made at chambers, unless the same shall be affirmed by the circuit court; and from the order of said court, affirming, setting aside, or altering the same, an appeal may be taken, provided such order is one of those enumerated in section two hundred and thirty-nine of this chapter.

Appeals from orders dissolving or discharging attachment or injunction when taken and what security.

SEC. 241. Upon an order made by a circuit judge or court dissolving or discharging an attachment or injunction, the party interested in continuing the same, may give immediate notice of appeal to the opposite party, and tender him a written undertaking with such surety as the judge shall direct, conditioned to pay all costs and damages sustained by such party, in case the appeal be decided in his favor. And thereupon the court may make an order in its discretion, to continue such attachment or injunction in force until the decision on the appeal, unless the respondent shall, at any time pending such appeal, give a written undertaking, with sufficient surety, to the appellant, to abide and perform the judgment in the action, if it shall be in favor of the appellant. But the court shall discharge such order, if it shall appear at any time that such appeal is not diligently prosecuted, and such want of diligence shall be deemed *prima facie* evidence of a breach of the apellants undertaking.

SEC. 242. Appeals from an order made at chambers, upon notice, may be taken within ten days after written notice of the making of such order; and such appeals shall be taken to a regular or special term of the circuit court. For the purpose of such appeal, either party may require the order to be entered of record by the clerk, and it shall be entered accordingly.

Appeals from orders at chambers to circuit court, and an order for that purpose entered.

SEC. 243. No injunction or attachment shall be dissolved at chambers by any other than a circuit judge; but a court commissioner may discharge an attachment, as provided in section 158 of this code.

Injunction or attachment not to be dissolved at chambers by any other than a circuit judge.

CHAPTER II.

Appeals to the Supreme Court from Judgments.

SECTION 244. On any appeal security must be given to pay costs and damages not exceeding two hundred and fifty dollars.
245. On judgments for money security to stay execution.
246. If judgments be to deliver documents, they must be deposited.
247. If to execute conveyance it must be executed and deposited.
248. Security where judgment is to deliver property, or for sale of mortgaged premises.
249. Stay of proceedings upon security given.
250. Undertaking may be in one instrument or several.
251. Security to be approved and to justify.
252. Perishable property may be sold notwithstanding an appeal.
253. Undertaking must be filed.

SEC. 244. To render an appeal effectual for any purpose, a written undertaking must be executed, on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages, which may be awarded against him, on the appeal, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk, with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

In any appeal security must be given to pay costs and damages not exceeding 250 dollars.

On judgment for money security to stay execution.

SEC. 245. If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid by the judgment or the part of such amount as to which the judgment shall be affirmed, only in part, and all the damages which shall be awarded against the appellant upon the appeal.

If judgment be to deliver documents, they must be deposited.

SEC. 246. If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things requird to be assigned or delivered, be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless the undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof, or county judge, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

If to execute conveyance, it must be executed and deposited.

SEC. 247. If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal, until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appelate court.

Security where judgment is to deliver property, or for sale of mortgaged premises.

SEC. 248. If the judgment appealed from, direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant with two sureties, to the effect, that during the possession of such property by the appellant, he will not commit or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and the occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court, by which the judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

Stay of proceedings upon security given.

SEC. 249. Whenever an appeal shall be perfected as provided by sections 245, 246, 247, and 248, it shall stay all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed, upon any other matter included in the action and not affected by the judgment appealed from.

Undertaking may be in one instrument or several.

SEC. 250. The undertakings prescribed by sections 244, 245, 246, and 248, may be in one instrument, or several, at the option of the appellant, and a copy including the names and residence of the sureties must be served on the adverse party, with the notice of appeal, unless a deposit is made as provided in section 244, and notice thereof given.

Security to be approved and to justify.

SEC. 251. An undertaking upon an appeal, shall be of no effect, unless it be accompained by the affidavit of the sureties, that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal, and unless they or other sureties justify before a judge of the court below, or a county judge as prescribed by sections 103 and 104, within ten days thereafter, the appeal shall be regarded, as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

Perishable property may be sold notwithstanding an appeal.

SEC. 252. In the cases not provided for in sections 245, 246, 247, 248 and 249, the perfecting of an appeal, by giving the undertaking mentioned in section 244, shall stay proceedings in the court below, upon the judgment appealed from, except that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof be deposited or invested, to abide the judgment of the appelate court.

Undertaking must be filed.

SEC. 253. The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered.

CHAPTER III.

Appeals to the Circuit Court or County Court, from Justice's Judgment.

SECTION 254. Existing laws repealed, and this chapter substituted.
255. By what courts judgment to be reviewed.
256. Appeal, when taken.
257. Notice of appeal to be served and costs paid.
258. Security to stay execution.
259. Form of undertaking.
260. Execution, how stayed.
261. In case of death of justice, undertaking to be filed.
262. Filing in lieu of service of notice of appeal.
263. Return, when and how made and compelled.
264. How made if justice be out of office.
265. Further return may be ordered.
266. If justice be dead, insane or absent.
267. Hearing upon return, dismissing of appeal if not brought in.
268. To be heard on original papers, and new trial in what cases.
269. Judgment on appeal, and judgment roll.
270. Costs, how awarded.
271. Ordering restitution.
572. Setting of costs on recovery.
273. The costs on appeal.
274. Costs in cases of new trial.

Existing laws repealed and this chapter substituted.

SEC. 254. All statutes now in force, providing for the review of judgments in civil cases, rendered by courts of justice of the peace, whether by appeal or certiorari, are hereby repealed, and hereafter the only mode of reviewing such judgments shall be an appeal as prescribed by this act.

By what courts judgment to be reviewed.

SEC. 255. An appeal from the judgments of such courts, in the cases mentioned in the preceding section, may be taken to the courts that are now authorized to review such judgment, either by appeal or certiorari, in the manner prescribed in this act and in no other manner.

Appeal when taken.

SEC. 256. The appellant shall, within twenty days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process, not personally served, and the defendant did not appear, he shall have twenty days after personal notice of the judgment, to serve the notice of appeal, provided for in this and the next section.

Notice of appeal to be served and costs paid.

SEC. 257. The notice of appeal must, within the same time, be served on the justice, personally, if living, and within the county, or on his clerk, if there be one, and on the respondent, personally, or by leaving it at his residence, with some person of suitable age and discretion, or in case the respondent is not a resident of the county, in the same manner on the attorney or agent, if any, who is a resident of such county, who appeared for him on the trial; and the appellant must, at the time of the service of the notice of appeal, on the justice, pay to him the costs of the action included in the judgment, together with one dollar costs of the return, which shall be restored to him in case the judgment is reversed, and be included in the judgment for costs on reversal.

Security to stay execution.

SEC. 258. If the appellant desire a stay of execution of the judgment, he shall give security, as provided in the next section.

Form of undertaking.

SEC. 259. The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the appellate judge, or by the court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied in whole or in part, the sureties will pay the amount unsatisfied.

Execution, how stayed.

SEC. 260. The delivery of the undertaking to the court below, shall stay the issuing of execution, or if it have been issued, the service of a copy of the undertaking, certified by the court below, upon the officer holding the execution, shall stay further proceedings thereon.

In case of death of justice undertaking to be filed.

SEC. 261. When by reason of the death of a justice of the peace, or his removal from the county or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the clerk of the appellate court and notice thereof given to the respondent, or his attorney or agent as provided in section 257, it shall thereupon have the same effect as if delivered to the justice.

Filing in lieu of service of notice of appeal.

SEC. 262. When by reason of the death of a justice of the peace or his absence from the county or any other cause, the notice of appeal cannot be served as provided

by section 256, it may be served by leaving the same with the clerk of the circuit court.

Return when, and how made and compelled

SEC. 263. The court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment, and file the same in the appellate court, and may be compelled to do so by attachment. But no justice of the peace shall be bound to make a return unless the fee prescribed by this act be paid on service of the notice of appeal.

How made if justice be out of office.

SEC. 264. When a justice of the peace by whom a judgment appealed from was rendered, shall have gone out of office, before a return was ordered, he shall, nevertheless make a return, in the same manner, and with the like effect, as if he were still in office.

Further return may be ordered.

SEC. 265. If the return be defective, the appellate court may direct a further or amended return, as often as may be necessary, and may compel a compliance with its order, by attachment.

If justice be dead, insane, or absent.

SEC. 266. If a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the state, the appellate court may examine witnesses on oath to the facts and circumstances of the trial or judgment, and determine the appeal as if the facts had been returned by the justice. If he shall have removed to another county within the state, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

Hearing upon return dismissing appeal if not brought in.

SEC. 267. If the return be made, the appeal may be brought to a hearing, at a regular term of the appellate court, upon a notice by either party of not less than eight days. It shall be placed upon the calendar, and continue thereon without further notice, until finally disposed of; but if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal unless it continue the same by special order for cause shown.

To be heard on original papers and new trial, in what cases.

SEC. 268. The appeal shall be heard on the original papers, and return of the justice containing all the material evidence and his rulings in the cause, in case where the judgment, exclusive of costs, does not exceed fifteen dollars.

But when the judgment shall exceed that sum, (the costs excluded,) and also where the judgment is against the complainant, or in his favor for a sum less than fifteen dollars, exclusive of costs, if he shall make oath at the time

of appealing, that he has a valid claim against the defendant, as set forth in his complaint, exceeding the sum of fifteen dollars, as he verily believes, the action shall be tried in the appellate court, as cases originally brought there; but the parties may, by consent appearing on the return of the justice, admit such return or any part thereof, as evidence on the trial of the appeal.

Judgment on appeal and judgment roll.

SEC. 269. Upon the hearing of the appeal, the appelate court shall give judgment according to the justice of the case, without regard to technical errors, or defects, which do not effect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all of the parties, and for errors of law or fact. This section shall only apply to cases where there is no new trial in the appellate court. To every judgment upon an appeal, there shall be annexed the return upon which it was heard, which shall be filed with the clerk of the court, and shall constitute the judgment roll.

Costs how awarded.

SEC. 270. If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party. This section shall apply to cases where there is no new trial in the appellate court.

Ordering restitution.

SEC. 271. If the judgment below, or any part thereof, be collected, and the judgment be afterwards reversed, the appellate court shall order the amount collected to be restored, with interest, from the time of collection. The order may be obtained upon proof of the facts made at or after the hearing, upon a previous notice of six days.

Setting off costs on recovery.

SEC. 272. If upon an appeal, a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

The costs on appeal.

SEC. 273. The following fees and costs, and no other, except fees of officers and disbursements, shall be allowed upon appeals:

To the appellant, on reversal, five dollars.

To the respondant, on affirmance, five dollars.

To a justice of the peace for his return, one dollar.

If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party, shall be such sum as the appellate court may award, not exceeding five dollars. If the appeal be dis-

missed for want of prosecution, no costs shall be allowed to either party.

Costs on cases of new trial.

SEC. 274. The same costs, fees and disbursements, shall be allowed to the successful party, in cases of new trial on appeal in the appellate court, as on affirmance or reversal of a judgment.

TITLE 12.

Of the Miscellaneous Proceedings in Civil Actions and General Provisions.

CHAPTER 1. Submitting a controversy without action.
2. Proceedings against joint debtors, heirs, devisees, legatees, and tenants holding under a judgment debtor.
3. Confession of judgment without action.
4. Offers of the defendant to compromise the whole or any part of the action.
5. Admission or inspection of writings.
6. Examination of parties.
7. Examination of witnesses.
8. Motions and orders.
9. Entitling affidavits.
10. Computation of time.
11. Notices, filing and service of papers.
12. Duties of sheriff and coroners.
13. Accountability of guardians.
14. Powers of referees.
15. Miscellaneous provisions.

CHAPTER 1.

Submitting a Controversy without Action.

SECTION 275. Controversy—how submitted without action.
276. Judgment on, as in other cases, but without costs.
277. Judgment may be enforced or appealed from, as in other cases.

SECTION 275. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit, that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case at a general term, and render judgment thereon as if an action were pending.

Controversy—how submitted without action.

SEC. 276. Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the notice of trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

Judgment on, as in other cases, but without costs.

SEC. 277. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Judgments may be enforced or appealed from as in other actions.

CHAPTER II

Proceedings against joint debtors, heirs, devisees, legatees, and tenants holding under a judgment debtor.

SECTION 278. Parties not summoned in action on joint contract, may be summoned after judgment.
279. If judgment debtor die, his representatives may be summoned.
280. Form of summons.
281. To be accompanied by affidavit of amount due.
282. Parties summoned may answer and defend.
283. Subsequent pleadings and proceedings same as in other actions.
284. Answer and reply to be verified as in an action.

SEC. 278. When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract by proceeding as provided in section 41, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned.

Parties not summoned in action on joint contract may be summoned after judgment.

If judgment debtor die, his representatives may be summoned.

SEC. 279. In case of the death of a judgment debtor after judgment, the heirs, devisees, or legatees of the judgment debtor, or the tenants of real property owned by him, and affected by the judgment, may after the expiration of three years from the time of granting letters testementary, or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively, and the personal representatives of a deceased judgment debtor, may be so summoned at any time within one year after their appointment.

Form of summons.

SEC. 280. The summons provided in the last two sections shall be subscribed by the judgment creditor, his representatives or attorney, shall describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons and shall be served in like manner as the original summons.

To be accompanied by affidavit of amount due.

SEC. 281. The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied to his knowledge or information and belief, and shall specify the amount due thereon.

Parties summoned may answer and defend.

SEC. 282. Upon such summons, the party summoned may answer within the time specified therein denying the judgment, or setting up any defence which may have arisen subsequently, and in addition thereto if he be proceeded against, according to section 279, he may make the same defence which he might originally have made to the action, except the statutes of limitation.

Subsequent pleadings and proceedings same as in other actions.

SEC. 283. The party issuing the summons, may demur or reply to the answer, and the party summoned may demur to the reply, and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment, may be compelled by attachment if necessary.

Answer and reply to be verified as in an action.

SEC. 284. The answer and reply shall be verified in the like cases and manner and be subject to the same rules as the answer and reply in an action.

CHAPTER III.

Confession of Judgment without Action.

SECTION 285. Judgment may be confessed for debt due or contingent liabilities.
286. Statement in writing and form thereof.
289. Judgment and execution.

SECTION 285. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Judgment may be confessed for debt due or contingent liability.

SEC. 286. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect: Statement in writing and form thereof.

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

SEC. 287. The statement may be filed with the clerk of the circuit court, who shall endorse upon it, and enter in the judgment book a judgment of the circuit court for the amount confessed, with ten dollars costs, together with disbursements. Judgment and execution.

The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon, by the attorney, or person issuing the same, a direction to the sheriff to collect the amount due

on such judgment, with interest and costs, which amount shall be stated with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the installments thereafter to become due; and whenever any further installment become due, execution may in like manner be issued for the collection and enforcement of the same.

CHAPTER IV.

Offers of the Defendant to Compromise the whole or part of the Action.

SECTION 288. Defendant may offer to liquidate damages conditionally.
289. Effect of acceptance or refusal of offer.

Defendant may offer to liquidate damages conditionally.

SEC. 288. In an action arising on contract, the defendant may with his answer serve upon the plaintiff, an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum, and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

Effect of acceptance or refusal of offer.

SEC. 289. If the plaintiff do not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence, and if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defence in respect to the question of damages, such expenses shall be ascertained at the trial.

CHAPTER V.

Admission or Inspection of Writings.

SECTION 290. A party may be required to admit a paper to be genuine or pay expenses of proving it. Inspection and copy of books, papers and documents, how obtained.

A party may be required to admit a paper to be genuine

SEC. 290. Either party may exhibit to the other or his attorney at any time before the trial, any paper material to the action, and request an admission in writing of its

genuineness. If the adverse party or his attorney fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to the expense in order to prove its genuineness, and the same be fully proved or admitted on the trial, such expense to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appears to the satisfaction of the court that there were good reasons for the refusal; but nothing in this act shall be construed to modify or repeal sections 90, 91 and 92, of chapter 88 of the revised statutes. The court before which an action is pending or a judge thereof may in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of any books, papers and documents in his possession or under his control containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court on motion may exclude the paper from being given in evidence or punish the party refusing, or both.

or pay expenses of proving it.

Inspection and copy of books, papers and documents; how obtained.

CHAPTER VI.

Examination of Parties.

SECTION 291. Actions for discovery abolished.

292. A party may examine his adversary as a witness on the trial.

293. Such examination also allowed before trial and proceedings therefor.

294. Party, how compelled to attend.

295. Testimony of party may be rebutted.

296. Effect of refusal to testify.

297. Testimony of a party not responsive to the inquiries, may be rebutted by the oath of the party calling him.

298. Persons for whom action is brought or defended may be examined.

299. Examination of a co-plainliff or co-defendant.

SEC. 291. No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had

Actions for discovery abolished.

on behalf of the adverse party, except in the manner prescribed by this chapter.

A party may examine his adversary as a witness on the trial.

SEC. 292. A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties; and for that purpose, may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify either at the trial, or conditionally, or upon commission.

Such examination also allowed before trial and proceedings therefor.

SEC. 293. The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

Party, how compelled to attend.

SEC. 294. The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

Testimony of party may be rebutted.

SEC. 295. The examination of the party thus taken, may be rebutted by adverse testimony.

Effect of a refusal to testify

SEC. 296. If a party refuses to attend and testify as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer or reply, may be stricken out.

Testimony of a party not responsive to the inquiries may be rebutted by the oath of the party calling him.

SEC. 297. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue; but if he testify to any new matter not responsive to the questions put to him by the adverse party or necessary to explain or qualify his answers thereto, or discharge; when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, and shall be so received.

Persons for whom action is brought or defended may be examined.

SEC. 298. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner and subject to the same rules of examination as if he were named as a party.

Examination of co-plaintiff or co-defendant.

SEC. 299. A party may be examined on behalf of his co-plaintiff, or of a co defendant, as to any matter in which he is not jointly interested, or liable with such co-plaintiff or co-defendant, and as to which a separate, and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever in the cases mentioned in sections two hundred and ninety-three, and two hundred and ninety-four, one of the several plaintiffs, or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received.

CHAPTER VII.

Examination of Witnesses.

SECTION 300. No witness to be excluded on account of interest.
301. To whom last section inapplicable, examination of assignor and adverse party, when necessary to give notice of the examination of assignor.

No witness to be excluded on account of interest.

SEC. 300. No person offered as a witness shall be excluded by reason of his interest in the event of the action.

To whom last section inapplicable.

SEC. 301. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended. When an assignor of a thing in action, or contract, is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee, or an executor, or administrator, unless the other party to such contract, or thing in action, whom the defendant, or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless ten days' notice of such intended examination of the assignor, specifying the points upon which he is intended to be examined, shall be given in writing to the adverse party.

When necessary to give notice of the examination of assignor.

CHAPTER VIII.

Motions and Orders.

SECTION 302. Definition of an order.
303. Definition of a motion, motion how and when made.
304. When notice is necessary it must be eight days before the hearing.
305. In action in circuit court, county judge and county commissioner may act at chambers. Their orders, how reviewed.
306. Special circuit, number of, how designated, and business done thereat.
307. In absence of judge at chambers motion may be transferred to another judge.
308. Enlarging time for proceedings in action.

Definition of an order.

SEC. 302. Every direction of a court or judge made or entered in writing, and not included in a judgment is denominated an order.

Definition of a motion.

Motions how and where made.

SEC. 303. An application for an order is a motion. Motions may be made to a judge out of court, except for a new trial on the merits. Motions must be made within the circuit in which the action is triable. Orders made out of court, without notice, may be made by any judge of the court, in any part of the state, and they may also be made by a county judge or court commissioner, of the county where the action is triable, except to stay proceedings after a verdict. No order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except upon previous notice to the adverse party.

When notice is necessary it must be eight days before the hearing.

SEC. 304. When a notice of motion is necessary, it must be served eight days before the time appointed for the hearing, but the court or judge may, by an order to show cause, prescribe a shorter time.

In action in circuit court county judge and commissioner may act at chambers.

Their orders, how reviewed

SEC. 305. In the action in the circuit court a county judge and court commissioner, in addition to the powers conferred upon them in this act, may exercise within their county the powers of a circuit judge in chambers, according to the existing practice, except as otherwise provided in this act, and their orders may be received by the circuit court as provided in this act. But such court

commissioners as are mentioned in this act, shall be appointed by the circuit court for the express purpose of performing the duties authorized by this act.

Special circuits, number of, how designated and business done thereat.

SEC. 306. There shall be held by each of the circuit judges in each circuit, at least four special terms, in each year, for the trial of issues of law, for the hearing and trial of causes without a jury, for the hearing of motions and the transacting of any and all business that may be done at a regular term, except the trial of issues of fact by a jury, at such time and places as the circuit judge shall designate; the said judges shall each, immediately, designate and publish the times and places of holding said terms, and when designated, they shall not be changed within two years, and at such terms, the issues of law and motions, and all other business that may be heard and disposed of with the same force and effect as it may now be heard and disposed of in the county in which the causes or matters are pending, and when the causes or matters are pending in other counties in the circuit different from the county in which the special term is held, the clerk of the court shall certify the orders and papers to the clerk of the circuit court of the county where the same is pending, and the papers shall be filed and entered by the clerk of the court of the county where the cause or matter is pending, in the same manner as if the cause or matter had been heard or decided by the circuit court at a term thereof held in that county.

In absence of judge at chambers notice may be transferred to another judge.

SEC. 307. When notice of a motion is given, or an order to show cause is returnable before a judge out of court, and at the time fixed for the motion he is absent, or unable to hear it, the same may be transferred by his order to some other judge before whom the motion might originally have been made.

Enlarging time for proceeding in action.

SEC. 308. The time within which any proceeding in an action must be had after its commencement, except the time within which an appeal must be taken, may be enlarged upon an affidavit showing grounds therefor, by a judge of the court, or court commissioner, or by a county judge. The affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

CHAPTER IX.

Entitling Affidavits.

SECTION 309. It shall not be necessary to entitle affidavits.

SECTION 309. It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title, or with a defective title, shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

CHAPTER X.

Computation of Time.

SECTION 310. Time, how computed.

SECTION 310. The time within which an act is to be done as herein provided, shall be computed by excluding the first day, and including the last. If the last day be Sunday, it shall be excluded.

CHAPTER XI.

Notices and Filing and Service of Papers.

SECTION 311. Notice and papers how served on party or attorney.
312. Service personal or by copy in office or house.
313. Service by mail, when and how.
314. Postage to be paid.
315. Double time when service by mail.
316. Notice of motion, &c., to be eight days.
317. When papers need not be served on defendant.
318. Service of papers where party resides out of the state.
319. Summons and pleadings to be filed.
320. When this chapter does not apply.

Notice and papers how served on party or attorney.

SECTION 311. Notices shall be in writing, and notices and other papers may be served on the party, or attorney, in the manner prescribed in the next three sections where not otherwise provided by this act.

Service personal or by copy in office or house.

SEC. 312. The service may be personal, or by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office, or if it be not open, so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the paper at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

Service by mail, when and how.

SEC. 313. Service by mail may be made, where the person making the service, and the person on whom it is to be made reside in different places between which there is a regular communication by mail.

Postage to be paid.

SEC. 314. In case of service by mail, the paper must be deposited in the post office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

Double time when served by mail.

SEC. 315. When the service is by mail, it shall be double the time required in case of personal service.

Notice of motion, &c. to be eight days.

SEC. 316. Notice of a motion or other proceeding before a court or judge when personally served, shall be given at least eight days before the time appointed therefor.

When papers need not be served on defendant.

SEC. 317. Where a defendant shall not have demurred or answered service of notice or papers in the ordinary proceedings in an action need not be made upon him unless he be imprisoned for want of bail; but shall be made upon him or his attorney, if notice of appearance in the action has been given.

Service of papers where party resides out of the state.

SEC. 318. Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the state and has no attorney in the action, the service may be made by mail, if his residence be known, if not known, on the clerk for the party.

Summons and pleadings to be filed.

SEC. 319. The summons and the several pleadings in an action, shall be filed with the clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice

to an order from a judge, that the same be filed, within a time specified in the order, or be deemed abandoned.

Service on attorney.

SEC. 320. Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney instead of the party.

When this chapter does not apply.

SEC. 321. The provisions of this chapter shall not apply to the service of a summons or other process or of any paper, to bring a party into contempt.

CHAPTER XII.

Duties of Sheriff and Coroners.

SECTION 322. Duty of sheriff or coroner in serving or executing process and how enforced.

Duty of sheriff or coroner in serving or executing process and how enforced.

SEC. 322. Whenever, pursuant to this act, the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects, for neglect of duty, and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process, when the sheriff is a party, and all the provisions of this act relating to sheriff's shall apply to coroners, where the sheriff is a party.

CHAPTER XIII.

Accountability of Guardians.

SECTION 323. Guardians not to receive property without security given.

Guardian not to receive property until security given.

SEC. 323. No guardian appointed for an infant shall be permitted to receive property of the infant, until he shall have given sufficient security, approved by a judge of the court, or a county judge, or court commmissioner, to account for and apply the same under the direction of the court.

CHAPTER XIV.

Powers of Referees.

SECTION 324. Referees are authorized to administer oaths and to exercise powers now vested in referees by law.

324. Every referee appointed pursuant to this act, shall have power to administer oaths in any proceeding before him, and shall have generally the powers now vested in a referee by law.

Referees are authorized to administer oaths and to exercise powers now vested in referees by law.

CHAPTER XV.

Miscellaneous Provisions.

SECTION 325. Papers lost or withheld, how supplied.
326. Where undertakings are to be filed.
327. On appeal judgment may be entered up against appellant and surety jointly, and when collected of surety.
328. In actions for the claim and delivery of personal property, judgment to be entered against principal and surety, and when collected of surety.
329. Judgment on bond and warrant of attorney. Affidavit of plaintiff necessary.
330. Time for publication of notices, how computed.

SEC. 325. If any original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

Papers lost or withheld, how supplied.

SEC. 326. The various undertakings required to be given by this act must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on the claim and delivery of personal property shall, after the justification of the sureties, be delivered by the sheriff, to the parties respectively, for whose benefit they are taken.

Where undertakings are to be filed.

SEC. 327. On an appeal from a justice of the peace, if the appellate court shall give judgment against the party appealing, such judgment may be entered up against the

On appeal judgment may be entered up against appel-

lant and surety jointly, and when collected of surety.

appellant and surety jointly, but it shall not be collected of the surety by the officer to whom the execution is directed, if he can find sufficient property of the principal to satisfy the same, and the party issuing execution, shall endorse a direction thereon to that effect.

Judgment against surety.

SEC. 328. When a judgment shall be entered up against either party, in an action for the claim and delivery of personal property, such judgment may be entered up as well against the principal as against any surety, who shall have signed a written undertaking with him, for a return or delivery of the property, as prescribed in this act, and in case where the officer to whom the execution is directed, may collect the value of the property, or any damages or costs of the principal, he shall, if he cannot find sufficient property of the principal to satisfy the same, collect the whole or any part of the judgment, which may remain unsatisfied, of the property of such surety or sureties, and the party issuing execution shall endorse a direction thereon to that effect.

Judgment on bond and warrant of attorney, affidavit of plaintiff necessary.

SEC. 329. Judgment upon bond or note and warrant of attorney may be entered up as now provided by law, and this act, so far as the entering of such judgment shall not apply thereto, but the plaintiff, or some one in his behalf, shall make and file with the judgment record an affidavit, stating the amount actually due on the bond or note, at the time of entering such judgment.

Time for publication of notice, how computed.

SEC. 330. The time for publication of legal notices shall be computed so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication.

TITLE 13.

Actions in particular Cases.

CHAPTER 1. Action in place of *scire facias*, *quo warranto*, and of information in the nature of *quo warranto*.

2. Action for the partition of real property.

3. Action to determine conflicting claims to real property, and concerning real property.

CHAPTER I.

Action in place of Scire Facias, Quo Warranto, and of information in the nature of Quo Warranto.

Section 331. *Scire facias* and *quo warranto* as prescribed in this act.
332. Actions of *quo warranto* and *mandamus*, where tried.
333. Action may be brought by attorney general to vacate a charter by direction of legislature.
334. Actions annulling corporation by attorney general, by leave of supreme court.
335. Leave, how obtained.
336. An action by attorney general, or other persons, to try the title to an office.
337. Action when and how brought, to vacate letters patent.
338. Relator, when to be joined as plaintiff.
339. Complaint and arrest of defendant in action for usurping an office.
340. Judgment in such cases.
341. Assumption of office, &c., by relator, when judgment in his favor.
342. Proceedings against defendant on refusal to deliver books and papers.
343. Damages, how recovered.
344. When actions against several persons claiming office or franchise.
345. Penalty for usurping office or franchise, how awarded.
346. Judgment of forfeiture against corporation.
347. Costs against corporation, or persons claiming to be such, how collected.
348. Restraining corporation, and appointment of a receiver.
349. Copy of judgment roll against corporation, when to be filed.
350. Actions for forfeiture of property to the people.

Scire facias and quo warranto as prescribed in this act.

SEC. 331. The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, shall be as here prescribed, and the remedies heretofore obtainable in those forms, may be obtained by civil action, under the provisions of this chapter. But any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected by this act. It shall not be necessary to sue out such writs in form.

Actions of quo warranto and mandamus, where tried.

SEC. 332. Actions of *quo warranto* and *mandamus* shall be tried at special as well as at general terms of the circuit court, and the court shall have power to summon a jury for the purpose and prescribe the manner of summoning the same.

Action may be brought by attorney general to vacate a charter by direction of the legislature.

SEC. 333. An action may be brought by the attorney general, in the name of the state, whenever the legislature shall direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact, by the persons incorporated, or by some of them, or with their knowledge and consent.

Action annulling corporation by attorney general by leave of supreme court.

SEC. 334. An action may be brought by the attorney general in the name of the state, on leave granted by the supreme court, or a judge thereof for the purpose of vacating the charter, or annulling the existence of a corporation other than municipal when such corporation shall:

1. Offend against any of the provisions of the act or acts, creating, altering or renewing such corporation.

2. Violate the provisions of any law, by which such corporation shall have forfeited its charter by abuse of its powers, or

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers, or

4. Whenever it shall have done, or omitted any act which amounts to a surrender of its corporate rights, privileges or franchise, or

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law. And it shall be the duty of the attorney general whenever he shall have reason to believe that any of these acts or omissions can be established by proof to apply for leave, and upon leave granted to bring the action in every case of public interest, and also in every other case in which satisfactory security shall

be given to indemnify the people of this state against the costs and expenses to be incurred thereby.

Leave, how obtained.

SEC. 335. Leave to bring the action may be granted upon the application of the attorney general, and the court or judge may in its discretion, direct notice of such application to be given to the corporation or its officers previous to granting such leave, and may hear the corporation in opposition thereto.

An action by attorney general or other persons to try the title to an office.

SEC. 336. An action may be brought by the attorney general in the name of the state upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise, any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state, or

2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office; or

3. When any association, or number of persons, shall act within this state as a corporation without being duly incorporated,

4. Such action may be brought in the name of the people of this state, by a private person on his own complaint, when the attorney general refuses to act, or when the office usurped pertains to a county, town, city or district.

Action, when and how brought to vacate letters patent.

SEC. 337. An action may be brought by the attorney general in the name of the state, for the purpose of vacating or annulling letters patent granted by the people of this state, in the following cases:

1. When he shall have reason to believe that such letters patent were obtained by means of some fraudulent suggestion, or concealment of a material fact, made by a person to whom the same were issued, or made with his consent or knowledge.

2. When he shall have good reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or

3. When he shall have reason to believe that the patentee, or those claiming under him, have done or omitted an act in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

Relator when to be joined as plaintiff.

SEC. 338. When an action shall be brought by the attorney general by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the state as plaintiff.

Complaint and arrest of defendant in action for usurping an office.

SEC. 339. Whenever such action shall be brought against a person for usurping an office, the attorney general or person complaining, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto, and in such case, upon proof by affidavit, that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the circuit court, for the arrest of such defendant, and holding him to bail, and thereupon he shall be arrested and held to bail, in the manner and with the same effect, and subject to the same rights and liabilities as in other civil actions, when the defendant is subject to arrest.

Judgment in such actions.

SEC. 340. In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

Assumption of office, &c., by relator when judgment in his favor.

SEC. 341. If the judgment be rendered upon the rights of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office, and it shall be his duty immediately thereafter, to demand of the defendant in the action, all the books and papers, in his custody, or within his power, belonging to the office from which he shall have been excluded.

Proceedings against defendant on refusing to deliver books and papers.

SEC. 342. If the defendant shall refuse or neglect to deliver over such books or papers pursuant to the demand, he shall be guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers, as are provided by law.

Damages, how recovered.

SEC. 343. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he should have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

When actions against several persons claiming office or franchise.

SEC. 344. When several persons claim to be entitled to the same office, or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Penalty for usurping office or franchise, how awarded.

SEC. 345. When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the state.

Judgment of forfeiture against corporations.

SEC. 346. If it shall be adjudged that a corporation against which an action shall have been brought pursuant to this chapter, has, by neglect, abuse or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered, that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Costs against corporations or persons claiming to be such, how collected.

SEC. 347. If judgment be recovered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected, by execution against the persons claiming to be a corporation, or by attachment or process against the directors, or other officers of such corporation.

Restraining corporations and appointment of a receiver.

SEC. 348. When such judgment shall be rendered against a corporation, the court shall have the same power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof among its creditors, as are given by law.

Copy of judgment roll against corporations, when to be filed.

SEC. 349. Upon the rendition of such judgment against a corporation, or for vacating or annulling of letters patent, it shall be the duty of the attorney general to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of state.

Actions for forfeiture of property to the people.

SEC. 350. Whenever by the provisions of law, any property, real or personal, shall be forfeited to the people of this state, or to any officer for their use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in the circuit court.

CHAPTER II.

Action for the Partition of Real Property.

SECTION 351. Provisions of revised statutes. Application to actions of partitions.

Provisions of revised statutes.

Application to actions of partition.

SEC. 351. The provisions of the revised statutes relating to the partition of lands, tenements and hereditaments, held or possessed by joint tenants in common, shall apply to actions for such partition, brought under this act, so far as the same can be applied to the substance and subject matter of the action without regard to its forms.

CHAPTER III.

Actions to determine conflicting claims to Real Property and concerning Real Property.

SECTION 352. Actions to determine claims to real property, how prosecuted.

353. Provisions of revised statutes applicable to actions concerning real property brought under this act.

Action to determine claims to real property, how prosecuted.

SEC. 352. Proceedings to compel the determination of claims to real property pursuant to the provisions of the revised statutes may be prosecuted by action under this act without regard to the forms of the proceedings as they are prescribed by those statutes.

Provisions of revised statutes applicable to actions concerning real property brought under this act.

SEC. 353. The general provisions of the revised statutes relating to actions concerning real property, shall apply to actions brought under this act according to the subject matter of the action and without regard to its forms.

TITLE 14.

Provisions relating to existing Suits.

SECTION 354. Manner of reviewing judgment in existing cases.
355. Execution on judgments heretofore rendered.
356. Provisions of this act applicable to proceedings in actions.

Manner of reviewing judgment in existing cases.

SEC. 354. Wherever a right now exists to have a review of a judgment rendered, or order or decree made before the tenth day of December, eighteen hundred and fifty-six, such review may be had upon an appeal taken in the manner provided by this act. But this section shall not extend the right of review to any case or question to which it does not now extend, nor the time of appealing, nor shall it apply to a case where a writ of error has been already issued.

Execution on judgment heretofore rendered.

SEC. 355. An execution may be issued without leave of the court upon a judgment docketed before the tenth day of December, eighteen hundred and fifty-six, or now or hereafter to be rendered in any action pending on that day, at any time within two years after the rendering of the judgment.

Provisions of this act applicable to proceedings in actions.

SEC. 356. The provisions of this act apply to future proceedings in actions or suits heretofore commenced and now pending as follows:

1. If there have been no pleading therein, to the pleadings and all subsequent proceedings.

2. When there is an issue of law or of fact or any other issue of fact to be tried, to the trial and subsequent proceedings.

3. After a judgment or order to the proceedings to enforce, vacate, modify or reverse it, including the costs of an appeal.

TITLE 15.

Definition of Real Property, &c.

SECTION 357. Definition of real property.
358. Definition of personal property.
359. Definition of property.
360. Definition of a circuit.
361. Common law, rule of construction of statute inapplicable to this act.
362. Statutory provisions inconsistent with this act, repealed.
363. Rules and practices inconsistent with this act abrogated.
364. Judges of the supreme court to make general rules, and until then, the rules of courts of New York to be the rules of practice.
365. This act not to affect certain proceedings and statutory provisions.
366. Certain parts of revised and other statutes repealed.
367. How this act to be printed.
368. Governor to appoint person to superintend printing, &c.

Definition of real property.

SEC. 357. The words "real property," as used in this act, are co-extensive, with lands, tenements and hereditaments.

Definition of personal property.

SEC. 358. The words "personal property," as used in this act, include money, goods, chattels, things in action, and evidences of debt.

Definition of property.

SEC. 359. The word "property," as used in this act, includes property real and personal.

Definition of a circuit.

SEC. 360. The word "circuit," as used in this act, signifies judicial circuit, except when otherwise specified.

Common law rule of construction of statute inapplicable to this act.

SEC. 361. The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this act.

Statutory provision incon-

SEC. 362. All statutory provisions inconsistent with this act are repealed; but this repeal shall not revive a

statute or law which may have been repealed or abolished by the provisions hereby repealed. All the rights of action given or secured by existing laws, may be prosecuted in the manner provided by this act. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the court where such action arises, shall provide a remedy which shall conform as near as may be to this act. Statutes inconsistent with this act repealed.

Sec. 363. The present rules and practice of the courts in civil actions inconsistent with this act are abrogated; but where consistent with this act, they shall continue in force, subject to the power of the respective courts to relax, or modify, or alter the same. Rules and practices inconsistent with this act abrogated.

Sec. 364. The judges of the supreme court shall meet in the capitol, at the city of Madison, on the second Wednesday in December eighteen hundred and fifty-six, and revise their general rules, and the rules of the circuit courts, and make such amendments thereto as may be necessary to carry into effect the code of proceedings; and till such revision, the rules of the court of appeals and supreme court of New York, adopted since eighteen hundred and forty-eight, shall, as far as applicable, be the rules of practice in the courts of record in this state. Judges of supreme court to make general rules, and until then the rules of courts of New York to be rules of practice.

Sec. 365. Until the legislature shall otherwise provide, this act shall not affect proceedings upon *mandamus*, or prohibition nor appeals from probate courts, nor any special statutory remedy not heretofore obtained by action, nor any existing statutory provisions, relating to actions, not inconsistent with this act, and in substance applicable to the actions hereby provided; nor any special proceedings provided for by the revised statutes, except that when in consequence of any such proceeding, a civil action shall be brought, such action shall be conducted in conformity with this act. This act not to affect certain proceedings and statutory provisions.

Sec. 366. Chapter one hundred twelve and one hundred ninteen of the revised statutes, except sections six, seven, eight, nine, ten, eleven, twenty-five and twenty-six, of the first named chapter, and chapter eighty-nine of the session laws of eighteen hundred fifty one are hereby repealed, except as the provisions of said chapter are allowed by this act to apply to suits under this code. Certain parts of revised and other statutes repealed.

Sec. 367. The secretary of state shall, forthwith, after the passage of this act, cause six thousand copies thereof to be printed in a separate pamphlet, as session laws are How this act to be printed.

now printed, and he shall, as soon as said pamplet is printed, distribute the same as the session laws are now required to be distributed, by law, and the remaining copies shall be retained in the office of the secretary of state, to be sold at cost to any person desiring to purchase the same, (not more than five copies to one person), and it shall not be necessary to print the [this] act in the session laws.

Governor to appoint person to superintend printing, &c.

SEC. 368. The governor shall appoint some competent person, whose duty it shall be to superintend the printing of said pamphlet, and revise and correct the proof sheets, and divide the same into proper titles and chapters and sections, with a suitable index, and such person shall be entitled to five dollars per day for his services, and his account, when sworn to by him, shall be audited and paid by the state treasurer out of any money not otherwise appropriated.

WILLIAM HULL,
Speaker of the Assembly.

ARTHUR McARTHUR,
Lt. Gov. and President of the Senate.

Approved October 9th, 1856.

COLES BASHFORD.

Chapter 127.

Published November 18.

An Act to fix the time when an act entitled "an act to simplify and abridge the practice, pleadings, and proceedings in the courts of this state," approved October 10th, 1856, shall take effect.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Extending time of taking effect of code.

SECTION 1. The act entitled "an act to simplify and abridge the practice, pleadings and proceedings in the courts of this state," approved October 10th, 1856, shall take effect and be in force on the first day of March next, and not before, and all acts and parts of acts repealed by the act of which this is amendatory, shall remain in full force and effect until the first day of March next, and no longer.

All parts of code inconsistent herewith repealed.

SEC. 2. So much of the act of which this is amendatory, as conflicts with the provisions of this act, is hereby repealed.

When this act takes effect.

SEC. 3. This act shall take effect and be in force from and after its passage and publication, and this act shall be published in connection with the act of which it is amendatory.

WILLIAM HULL,
Speaker of the Assembly.

L. P. HARVEY,
President pro tem of the Senate.

Approved October 13, 1856.

COLES BASHFORD.

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